Capital Litigation for Arizona Prosecutors

February 23, 2018 APAAC Training Center Phoenix, Arizona



CAPITAL DEFENDANT'S PRESCREENING FOR INTELLECTUAL DISABILITY & AN OVERVIEW OF INTELLECTUAL DISABILITY IN ARIZONA

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1951 West Camelback Rd., Suite 202 Phoenix, Arizona 85015 2018 WL 910928 Only the Westlaw citation is currently available. Supreme Court of Arizona.

STATE of Arizona, Petitioner,

v.

The Honorable Pamela S. GATES,
Judge of the Superior Court of the
State of Arizona, in and for the County
of Maricopa, Respondent Judge,
Apolinar Altamirano, Real Party in Interest.

No. CR-17-0326-PR | Filed February 16, 2018

Special Action from the Superior Court in Maricopa County, The Honorable Pamela S. Gates, Judge, No. CR2015–103569. VACATED AND REMANDED

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JUSTICE GOULD authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE PELANDER, and JUSTICES BRUTINEL, TIMMER, BOLICK, and LOPEZ joined.

Opinion

JUSTICE GOULD, opinion of the Court:

*1 \P 1 In this case, we address the procedure for evaluating a capital defendant's intellectual

disability ("ID") status before trial. Arizona Revised Statutes § 13–753(B) states the trial court shall order a pretrial ID evaluation in every capital case unless the defendant objects. If an objection is lodged, the defendant waives the right to a pretrial evaluation. *Id.*

¶ 2 We hold a defendant cannot void his waiver under § 13–753(B) by later withdrawing his objection. We also hold, however, that a defendant's waiver does not deprive the court of its discretionary authority to order a pretrial ID evaluation if the defendant later requests or consents to one.

I.

- ¶ 3 In January 2015, Apolinar Altamirano was charged with first degree murder. Following his indictment, the State filed a notice of intent to seek the death penalty. In April 2015, the trial court ordered Altamirano to undergo an ID prescreening evaluation pursuant to § 13–753. Altamirano objected to the evaluation but also stated he did "not waive his right to raise these issues at a later time, if appropriate, and his refusal to participate in the evaluation [] pursuant to the Court's order ... should not be deemed or construed as a waiver of that right."
- ¶ 4 In May 2017, more than two years after filing his objection, and only four months before the scheduled trial date, Altamirano filed a motion "withdraw [ing] his objection to court-ordered testing" and "requesting that the statutory requirements of A.R.S. § 13–753(B) be applied." Over the State's objection, the trial court granted the motion. The court concluded that § 13–753(B) permits Altamirano to reinstate his right to a pretrial ID evaluation by withdrawing his objection.
- ¶ 5 The State filed a special action with the court of appeals, which declined to exercise jurisdiction. The State then filed a petition for review with this Court.
- ¶ 6 We granted review because this case involves a legal issue of statewide importance. We have

jurisdiction pursuant to article 6, section 5(3), of the Arizona Constitution.

II.

- ¶ 7 We review the trial court's interpretation of a statute de novo. Parrot v. Daimler Chrysler Corp., 212 Ariz. 255, 257 ¶ 7, 130 P.3d 530, 532 (2006). In interpreting a statute, our goal is to give effect to the legislature's intent. State v. Peek, 219 Ariz. 182, 184 ¶ 11, 195 P.3d 641, 643 (2008). If a statute, by its terms, is unambiguous, we apply it as written without resorting to other rules of statutory interpretation. State v. Jurden, 239 Ariz. 526, 530 ¶ 15, 373 P.3d 543, 547 (2016). Statutes relating to the same subject or having the same general purpose "should be read in connection with, or should be construed together with other related statutes, as though they constituted one law." State ex rel. Larson v. Farley, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970); see Stambaugh v. Killian, 242 Ariz. 508, 509 ¶ 7, 398 P.3d 574, 575 (2017) (same).
- ¶ 8 Here, we also construe § 13–753(B) against the backdrop of the Eighth Amendment. Executing a defendant who has an ID violates the Eighth Amendment's protection against cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304, 307, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Thus, if a court or a jury determines a defendant has an ID, a death sentence cannot be imposed. *Id.*; *see also* A.R.S. § 13–753(A) (stating a person who has an ID "shall not be sentenced to death"); *State v. Escalante–Orozco*, 241 Ariz. 254, 266 ¶ 8, 386 P.3d 798, 810 (2017).
- *2 ¶ 9 In *Atkins*, the United States Supreme Court left to the states "the task of developing appropriate ways to enforce" this constitutional restriction. 536 U.S. at 317, 122 S.Ct. 2242; *see also Moore v. Texas*, U.S. —, 137 S.Ct. 1039, 1048–49, 197 L.Ed.2d 416 (2017) (holding that states do not have unfettered discretion to reject medical community standards in defining ID); *Bobby v. Bies*, 556 U.S. 825, 831, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009) (stating that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person" has an ID). As relevant here, *Atkins*

does not require an ID determination be made before trial. *See Commonwealth v. Sanchez*, 614 Pa. 1, 36 A.3d 24, 51–53 (2011) (noting that *Atkins* did not prescribe a procedure mandating a pre-trial determination of a defendant's ID status).

¶ 10 Arizona's procedure for determining a defendant's ID status is set forth in § 13–753(B), which states:

If the state files a notice intent to seek death penalty, the court, unless the defendant objects, shall appoint a prescreening psychological expert in order to determine the defendant's intelligence quotient.... If the defendant objects to the prescreening, the defendant waives the right to a pretrial determination of status. The waiver does not preclude the defendant from offering evidence of the defendant's intellectual disability in the penalty phase.

- ¶11 Section 13–753 thus grants a capital defendant the right to obtain a pretrial evaluation of his ID status. Stated another way, under the statute, the court is required to order an ID evaluation; the defendant does not have to request an evaluation, nor is he required to make any showing to obtain one. *Id*.
- ¶ 12 If the defendant objects to prescreening, he waives his right to a pretrial determination of his intellectual status. *Id.*; *Escalante–Orozco*, 241 Ariz. at 287 ¶ 134, 386 P.3d at 831. This waiver provision is, by its terms, limited to a defendant's right to obtain a pretrial evaluation; a defendant may still present evidence of his ID status during the penalty phase. *Id*; § 13–753(B).
- ¶ 13 Altamirano argues that § 13–753(B) permits him to void any waiver by withdrawing his objection. We disagree. Altamirano's construction of the statute renders the waiver provision

meaningless. If, as Altamirano contends, he can withdraw his objection at any time before trial and obtain a pretrial evaluation, there is, effectively, no statutory waiver. "We presume the legislature did not intend to write a statute that contains a void, meaningless, or futile provision"; thus, "[w]hen possible, we interpret statutes to give meaning to every word." *State v. Pitts*, 178 Ariz. 405, 407, 874 P.2d 962, 964 (1994).

¶ 14 Accordingly, we conclude that § 13–753(B) prohibits Altamirano from reinstating his right to a pretrial ID evaluation by withdrawing his objection. And this conclusion is not altered by Altamirano's qualified objection in which he tried to avoid waiver by preserving "his right to raise these issues at a later time."

Ш.

¶ 15 As noted above, a defendant's waiver under § 13–753(B) only applies to his right to a pretrial ID determination. See supra ¶ 12. The waiver provision does not, however, prohibit the court from ordering an ID evaluation despite a defendant's earlier waiver. Section 13-753(B) authorizes courts in capital cases to order a prescreening determination of a defendant's ID status. See also A.R.S. § 13-753(H) (stating that if a "trial court finds that defendant has an [ID]," it "shall dismiss the intent to seek the death penalty," and "shall not impose a sentence of death on the defendant") (emphasis added). And courts generally have the authority to evaluate a criminal defendant's mental status before trial in both capital and noncapital cases. See A.R.S. § 13–754 (authorizing a court, unless

defendant objects, to order a competency exam in a capital case); A.R.S. § 13–4503 (stating courts have the authority to order a competency exam in a noncapital case); A.R.S. § 13–4506 (permitting a court to order an insanity examination).

*3 ¶ 16 However, the court's authority to order an examination is not unlimited. Because a defendant has the right to object to an ID evaluation, the court may not order an examination unless the defendant either requests or consents to the examination. See supra ¶¶ 11, 14. Additionally, in making a post-waiver determination, the court must consider whether ordering an evaluation would prejudice the state or the victims. Such prejudice includes, but is not limited to, whether the evaluation would require the court to continue an existing trial date. See Ariz. Const. art. 2, $\S 2.1(A)(10)$ (stating the victim has a right "[t]o a speedy trial ... and prompt and final conclusion of the case"). Moreover, if the court, after considering all the above factors, decides to deny the defendant's request, the defendant may still offer evidence of his ID status during the penalty phase. A.R.S. § 13–753(B).

IV.

¶ 17 For the foregoing reasons, we vacate the trial court's order, and we remand this case for that court to consider Altamirano's request for an ID evaluation applying the guidelines set forth in this opinion.

All Citations

--- P.3d ----, 2018 WL 910928

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Not Followed on State Law Grounds Com. v. Sanchez, Pa., December
21, 2011

122 S.Ct. 2242 Supreme Court of the United States

Daryl Renard ATKINS, Petitioner, v. VIRGINIA.

> No. 00-8452. | Argued Feb. 20, 2002. | Decided June 20, 2002.

Synopsis

Defendant was convicted, in the Circuit Court, York County, N. Prentis Smiley, Jr., J., of capital murder and was sentenced to death. The Virginia Supreme Court affirmed the conviction, 257 Va. 160, 510 S.E.2d 445, and sentence, 260 Va. 375, 534 S.E.2d 312. Certiorari was granted. The Supreme Court, Justice Stevens, held that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by Eighth Amendment, abrogating Penry v. Lynaugh, 109 S.Ct. 2934.

Reversed and remanded.

Chief Justice Rehnquist dissented and filed opinion in which Justices Scalia and Thomas joined.

Justice Scalia dissented and filed opinion in which Chief Justice Rehnquist and Justice Thomas joined.

West Headnotes (5)

[1] Sentencing and Punishment

Proportionality

Punishment is "excessive," and therefore prohibited by Eighth Amendment, if it is not graduated and proportioned to offense. U.S.C.A. Const.Amend. 8.

270 Cases that cite this headnote

[2] Sentencing and Punishment

Scope of Prohibition

Claim that punishment is unconstitutionally excessive is judged by currently prevailing standards of decency. U.S.C.A. Const.Amend. 8.

95 Cases that cite this headnote

[3] Sentencing and Punishment

Excessiveness and Proportionality of Sentence

Sentencing and Punishment

Punishment authorized by statute

Determination of whether punishment in particular case is unconstitutionally excessive in light of evolving community standards should be informed by objective factors to maximum possible extent, with clearest and most reliable one being legislation enacted by country's legislatures. U.S.C.A. Const.Amend. 8.

147 Cases that cite this headnote

[4] Criminal Law

←Sentencing

Sentencing and Punishment

Excessiveness and Proportionality of Sentence

In deciding whether punishment in particular case is unconstitutionally excessive, Supreme Court may bring its own judgment to bear by asking whether there is reason to agree or disagree with judgment reached by citizenry and its legislators. U.S.C.A. Const.Amend. 8.

246 Cases that cite this headnote

Sentencing and Punishment Mentally retarded persons

Execution of mentally retarded criminal is unconstitutionally "cruel and unusual punishment," abrogating Penry v. Lynaugh, 109 S.Ct. 2934.

1433 Cases that cite this headnote

**2242 *304 Syllabus*

Petitioner Atkins was convicted of capital murder and related crimes by a Virginia jury and sentenced to death. Affirming, the Virginia Supreme Court relied on *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, in rejecting Atkins' contention that he could not be sentenced to death because he is mentally retarded.

**2243 *Held:* Executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment. Pp. 2246–2252.

- (a) A punishment is "excessive," and therefore prohibited by the Amendment, if it is not graduated and proportioned to the offense. E.g., Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793. An excessiveness claim is judged by currently prevailing standards of decency. Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630. Proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, see, e.g., Harmelin v. Michigan, 501 U.S. 957, 1000, 111 S.Ct. 2680, 115 L.Ed.2d 836, the clearest and most reliable of which is the legislation enacted by the country's legislatures, Penry, 492 U.S., at 331, 109 S.Ct. 2934. In addition to objective evidence, the Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators, e.g., Coker v. Georgia, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982. Pp. 2246-2248.
- (b) Much has changed since *Penry's* conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a consensus. 492 U.S., at 334, 109

- S.Ct. 2934. Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition. *305 Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon. Pp. 2248–2250.
- (c) An independent evaluation of the issue reveals no reason for the Court to disagree with the legislative consensus. Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability. In light of these deficiencies, the Court's death penalty jurisprudence provides two reasons to agree with the legislative consensus. First, there is a serious question whether either justification underpinning the death penalty—retribution and deterrence of capital crimes—applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see Godfrey v. Georgia, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable **2244 also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate

face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes. Pp. 2250–2252.

260 Va. 375, 534 S.E.2d 312, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C.J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 2252. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, *post*, p. 2259.

Attorneys and Law Firms

*306 James W. Ellis, for the petitioner.

Pamela A. Rumpz, for the respondent.

Opinion

Justice **STEVENS** delivered the opinion of the Court.

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the *307 reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

I

Petitioner, Daryl Renard Atkins, was convicted of

abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Jones and Atkins both testified in the guilt phase of Atkins' trial.1 Each confirmed most of the details in the other's account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. Jones' testimony, which was both more coherent and credible than Atkins', was obviously credited by the jury and was **2245 sufficient to establish Atkins' guilt.2 At the penalty *308 phase of the trial, the State introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and "vileness of the offense." To prove future dangerousness, the State relied on Atkins' prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove the second aggravator, the prosecution relied upon the trial record, including pictures of the deceased's body and the autopsy report.

In the penalty phase, the defense relied on one witness, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was "mildly mentally retarded." His conclusion was based on interviews with people who knew Atkins, 4 a review of school and court *309 records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59.5

The jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second **2246 sentencing hearing because the trial court had used a misleading verdict form. 257 Va. 160, 510 S.E.2d 445 (1999). At the resentencing, Dr. Nelson again testified. The State presented an expert rebuttal witness, Dr. Stanton Samenow, who expressed the opinion that Atkins was not mentally retarded, but rather was of "average intelligence, at least," and diagnosable as having antisocial personality disorder.⁶ App. 476. The jury again sentenced Atkins to death.

*310 The Supreme Court of Virginia affirmed the imposition of the death penalty. 260 Va. 375, 385, 534 S.E.2d 312, 318 (2000). Atkins did not argue before the Virginia Supreme Court that his sentence was disproportionate to penalties imposed for similar crimes in Virginia, but he did contend "that he is mentally

retarded and thus cannot be sentenced to death." *Id.*, at 386, 534 S.E.2d, at 318. The majority of the state court rejected this contention, relying on our holding in *Penry*. 260 Va., at 387, 534 S.E.2d, at 319. The court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score." *Id.*, at 390, 534 S.E.2d, at 321.

Justice Hassell and Justice Koontz dissented. They rejected Dr. Samenow's opinion that Atkins possesses average intelligence as "incredulous as a matter of law," and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive." *Id.*, at 394, 395–396, 534 S.E.2d, at 323–324. In their opinion, "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." *Id.*, at 397, 534 S.E.2d, at 325.

Because of the gravity of the concerns expressed by the dissenters, and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years, we granted certiorari to revisit the issue that we first addressed in the *Penry* case. 533 U.S. 976, 122 S.Ct. 24, 150 L.Ed.2d 805 (2001).

*311 II

The Eighth Amendment succinctly prohibits "[e]xcessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), we held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. We explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Id., at 367, 30 S.Ct. 544. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See Harmelin v. Michigan, 501 U.S. 957, 997-998, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also id., at 1009-1011, 111 S.Ct. 2680 (White, J., dissenting).7 Thus, even **2247 though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666–667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667, 82 S.Ct. 1417.

the standards that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the *312 evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100–101, 78 S.Ct. 590.

[3] Proportionality review under those evolving standards should be informed by "objective factors to the maximum possible extent," see Harmelin, 501 U.S., at 1000, 111 S.Ct. 2680 (quoting Rummel v. Estelle, 445 U.S. 263, 274-275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Penry, 492 U.S., at 331, 109 S.Ct. 2934. Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, Coker v. Georgia, 433 U.S. 584, 593-596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, Enmund v. Florida, 458 U.S. 782, 789-793, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In Coker, we focused primarily on the then-recent legislation that had been enacted in response to our decision 10 years earlier in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam), to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman." Coker, 433 U.S., at 596, 97 S.Ct. 2861. The "current legislative judgment" relevant to our decision in Enmund was less clear than in Coker but "nevertheless weigh[ed] on the side of rejecting capital punishment for the crime at issue." *Enmund*, 458 U.S., at 793, 102 S.Ct. 3368.

^[4] We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be

brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U.S., at 597, 97 S.Ct. 2861. For example, in *Enmund*, we concluded by expressing our own judgment about the issue:

"For purposes of imposing the death penalty, Enmund's criminal *culpability* must be limited to his participation *313 in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of *the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment* for purposes of construing and applying the Eighth Amendment." 458 U.S., at 801, 102 S.Ct. 3368 (emphasis added).

Thus, in cases involving a consensus, our own judgment is "brought to bear," *Coker*, 433 U.S., at 597, 97 S.Ct. 2861, by asking whether there is reason to disagree with **2248 the judgment reached by the citizenry and its legislators.

Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.

Ш

The parties have not called our attention to any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986. In that year, the public reaction to the execution of a mentally retarded murderer in Georgia⁸ apparently led to the enactment *314 of the first state statute prohibiting such executions.9 In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a "sentence of death shall not be carried out upon a person who is mentally retarded."10 In 1989, Maryland enacted a similar prohibition.11 It was in that year that we decided *Penry*, and concluded that those two state enactments, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." 492 U.S., at 334, 109 S.Ct. 2934.

Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994.12 In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. 13 Nebraska followed suit in 1998.14 There appear *315 to have been no similar enactments during the next two years, but in 2000 and 2001 six more States—South Dakota, Arizona. Connecticut. Florida. Missouri. and Carolina—joined the procession. 15 The Texas Legislature unanimously **2249 adopted a similar bill,16 and bills have passed at least one house in other States, including Virginia and Nevada.17

It is not so much the number of these States that is significant, but the consistency of the direction of change.18 Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the *316 complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.¹⁹ Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*.²⁰ The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.21

**2250 *317 To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded

offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 405, 416–417, 106 S.Ct. 2595.²²

IV

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

*318 As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.²³ There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.²⁴ Their deficiencies **2251 do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as *319 a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably

contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S., at 798, 102 S.Ct. 3368.

With respect to retribution—the interest in seeing that the offender gets his "just deserts"—the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since Gregg, jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." Id., at 433, 100 S.Ct. 1759. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence—the interest in preventing capital crimes by prospective offenders—"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," "Enmund, 458 U.S., at 799, 102 S.Ct. 3368. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. Gregg, 428 U.S., at 186, 96 S.Ct. 2909. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded *320 offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), is enhanced, not only by the **2252 possibility of false confessions, 25 but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and *321 are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S., at 323-325, 109 S.Ct. 2934. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

^[5] Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender. *Ford*, 477 U.S., at 405, 106 S.Ct. 2595.

The judgment of the Virginia Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner, *i.e.*, those defendants who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime. The Court pronounces *322 the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone, despite the fact that the laws of 19 other States besides Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime. See *ante*, at 2248.

I agree with Justice SCALIA, post, at 2259 (dissenting opinion), that the Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency. I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and **2253 opinion polls in reaching its conclusion. See ante, at 2249-2250, n. 21. The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved." Stanford v. Kentucky, 492 U.S. 361, 377, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (plurality opinion). The Court's uncritical acceptance of the opinion poll data brought to our attention, moreover, warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us.

In making determinations about whether a punishment is "cruel and unusual" under the evolving standards of decency embraced by the Eighth Amendment, we have emphasized that legislation is the "clearest and most reliable objective *323 evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). See also *McCleskey v. Kemp*, 481 U.S. 279, 300, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The reason we ascribe primacy to legislative enactments follows from the constitutional role legislatures play in expressing policy of a State. " '[I]n a democratic society

legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' " *Gregg v. Georgia*, 428 U.S. 153, 175–176, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting *Furman v. Georgia*, 408 U.S. 238, 383, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C. J., dissenting)). And because the specifications of punishments are "peculiarly questions of legislative policy," *Gore v. United States*, 357 U.S. 386, 393, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958), our cases have cautioned against using "the aegis of the Cruel and Unusual Punishment Clause' "to cut off the normal democratic processes, *Gregg, supra*, at 176, 96 S.Ct. 2909 (quoting *Powell v. Texas*, 392 U.S. 514, 533, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (plurality opinion)).

Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, " 'is a significant and reliable objective index of contemporary values," "Coker v. Georgia, 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion) (quoting Gregg, supra, at 181, 96 S.Ct. 2909), because of the jury's intimate involvement in the case and its function of " 'maintain[ing] a link between contemporary community values and the penal system," "Gregg, supra, at 181, 96 S.Ct. 2909 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). In Coker, supra, at 596–597, 97 S.Ct. 2861, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in Enmund v. Florida, 458 U.S. 782, 793-794, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where evidence of the current legislative judgment was not as "compelling" as that in Coker (but more so than that here), we were persuaded by "overwhelming [evidence] that American juries ... repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life.

*324 In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, **2254 better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his amici have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner.* Instead, it adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders, see ante, at 2249-2250, n. 21 (citing the Brief for European Union as Amicus Curiae 2). I fail to see, however, *325 how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. While it is true that some of our prior opinions have looked to "the climate of international opinion," *Coker, supra*, at 596, n. 10, 97 S.Ct. 2861, to reinforce a conclusion regarding evolving standards of decency, see *Thompson v*. Oklahoma, 487 U.S. 815, 830, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion); Enmund, supra, at 796–797, n. 22, 102 S.Ct. 3368; Trop v. Dulles, 356 U.S. 86, 102-103, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion); we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people." Stanford, 492 U.S., at 369, n. 1, 109 S.Ct. 2969 (emphasizing that "American conceptions of decency ... are dispositive" (emphasis in original)).

Stanford's reasoning makes perfectly good sense, and the Court offers no basis to question it. For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant. And nothing in Thompson, Enmund, Coker, or Trop suggests otherwise. Thompson, Enmund, and Coker rely only on the bare citation of international laws by the Trop plurality as authority to deem other countries' sentencing choices germane. But the Trop plurality—representing the view of only a minority of the Court—offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in Stanford.

To further buttress its appraisal of contemporary societal values, the Court marshals public opinion poll results and evidence that several professional organizations and religious groups have adopted official positions opposing the imposition of the death penalty upon mentally retarded offenders. See *ante*, at 2249–2250, n. 21 (citing Brief for American Psychological Association et al. as *Amici Curiae*; Brief for American Association on Mental Retardation et al. as *Amici Curiae*; noting that "representatives of widely diverse religious *326 communities **2255 ... reflecting Christian, Jewish,

Muslim, and Buddhist traditions ... 'share a conviction that the execution of persons with mental retardation cannot be morally justified' "; and stating that "polling data shows a widespread consensus among Americans ... that executing the mentally retarded is wrong"). In my view, none should be accorded any weight on the Eighth Amendment scale when the elected representatives of a State's populace have not deemed them persuasive enough to prompt legislative action. In Penry, 492 U.S., at 334-335, 109 S.Ct. 2934, we were cited similar data and declined to take them into consideration where the "public sentiment expressed in [them]" had yet to find expression in state law. See also Stanford, 492 U.S., at 377, 109 S.Ct. 2969 (plurality opinion) (refusing "the invitation to rest constitutional law upon such uncertain foundations" as "public opinion polls, the views of interest groups, and the positions adopted by various professional associations"). For the Court to rely on such data today serves only to illustrate its willingness to proscribe by judicial fiat—at the behest of private organizations speaking only for themselves—a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.

Even if I were to accept the legitimacy of the Court's decision to reach beyond the product of legislatures and practices of sentencing juries to discern a national standard of decency, I would take issue with the blind-faith credence it accords the opinion polls brought to our attention. An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results. See, e.g., R. Groves, Survey *327 Errors and Survey Costs (1989); 1 C. Turner & E. Martin, Surveying Subjective Phenomena (1984).

The Federal Judicial Center's Reference Manual on Scientific Evidence 221–271 (1994) and its Manual for Complex Litigation § 21.493, pp. 101–103 (3d ed.1995), offer helpful suggestions to judges called upon to assess the weight and admissibility of survey evidence on a factual issue before a court. Looking at the polling data (reproduced in the Appendix to this opinion) in light of these factors, one cannot help but observe how unlikely it is that the data could support a valid inference about the question presented by this case. For example, the

questions reported to have been asked in the various polls do not appear designed to gauge whether the respondents might find the death penalty an acceptable punishment for mentally retarded offenders in rare cases. Most are categorical (e.g., "Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?"), and, as such, would not elicit whether the respondent might agree or disagree that all mentally retarded people by definition can never act with the level of culpability associated with the death penalty, regardless of the severity of their impairment or the individual circumstances of their crime. Second, none of the 27 polls cited disclose the targeted survey population or the sampling techniques used by those who conducted the research. Thus, even if one accepts that the survey instruments were adequately designed to address a relevant question, it is impossible to know whether the sample was representative enough or the methodology sufficiently sound to tell us anything about the opinions of the citizens of a particular State or the American public at large. Finally, the information provided to us does not indicate why a particular survey was conducted or, in a few cases, by whom, factors which also can bear on the **2256 objectivity of the results. In order to be credited here, such surveys should be offered as *328 evidence at trial, where their sponsors can be examined and cross-examined about these matters.

* * *

There are strong reasons for limiting our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practices of sentencing juries in America. Here, the Court goes beyond these well-established objective indicators of contemporary values. It finds "further support to [its] conclusion" that a national consensus has developed against imposing the death penalty on all mentally retarded defendants in international opinion, the views of professional and religious organizations, and opinion polls not demonstrated to be reliable. *Ante*, at 2249–2250, n. 21. Believing this view to be seriously mistaken, I dissent.

APPENDIX TO OPINION OF REHNQUIST, C. J.

Poll and survey results reported in Brief for American Association on Mental Retardation et al. as *Amici Curiae* in 3a–7a, and cited by the Court, *ante*, at 2249–2250, n. 21:

S T A T E	POLL	D A T E	RESPONSE	QUESTION
A R	Arkansans' Opinion on the Death Penalty, Opinion Research Associates, Inc., Q. 13 (July 1992) John DiPippa, Will Fairchild's Death Violate the Constitution, or Simply Our Morality?, Arkansas Forum, Sept. 1993	1 9 9 2	61% never appropriate 17% is appropriate 5% opposed to all executions 17% undecided	"Some people say that there is nothing wrong with executing a person who is mentally retarded. Others say that the death penalty should never be imposed on a person who is mentally retarded. Which of these positions comes closest to your own?"
A Z	Behavior Research Center, Survey 2000, Q. 3 (July 2000)	2 0 0 0	71% oppose 12% favor 11% depends 6% ref/unsure	"For persons convicted of murder, do you favor or oppose use of the death penalty when the defendant is mentally retarded?"
C A	Field Research Corp., California Death Penalty Survey, Q. 22 (Dec.1989) Frank Hill, Death Penalty For The Retarded, San Diego Union–Tribune, Mar. 28, 1993, at G3	1 9 8 9	64.8% not all right 25.7% is all right 9.5% no opinion	"Some people feel there is nothing wrong with imposing the death penalty on persons who are mentally retarded depending on the circumstances. Others feel the death penalty should never be imposed on persons who are mentally retarded under any circumstance. The death penalty on a mentally retarded person is?"

C A	Field Research Corp., California Death Penalty Survey, Q. 62D (Dec.1997) Paul Van Slambrouck, Execution and a Convict's Mental State, The Christian Science Monitor, Apr. 27, 1998, at 1	1 9 9 7	74% disagree 17% agree 9% no opinion	"Mentally retarded defendants should be given the death penalty when they commit capital crimes."
C T	Quinnipac University Polling Institute, Death Penalty Survey Info., Q. 35 (April 23, 2001)	2 0 0 1	77% no 12% yes 11% don't know	"Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?"
F L	Amnesty International Martin Dyckman, <i>Death</i> <i>Penalty's High Price</i> , St. Petersburg Times, Apr. 19, 1992, at 3D	1 9 8 6	71% opposed	[not provided]
G A	Georgia State University Tracy Thompson, Executions of Retarded Opposed, Atlanta Journal, Jan. 6, 1987, at 1B	1 9 8 7	66% opposed 17% favor 16% depends	[not provided]
L A	Marketing Research Inst., Loyola Death Penalty Survey, Q. 7 (Feb.1993)	1 9 9 3	77.7% no 9.2% yes 13% uncertain	"Would you vote for the death penalty if the convicted person is mentally retarded?"
L A	Louisiana Poll, Poll 104, Q. 9 (Apr.2001)	2 0 0	68% no 19% yes 11% no opinion 2% won't say	"Do you believe mentally retarded people, who are convicted of capital murder, should be executed?"
M D	Survey Research Center, University of Maryland (Nov.1988)	1 9 8 8	82% opposed 8% favor 10% other	"Would you favor or oppose the death penalty for a person convicted of murder if he or she is mentally retarded?"
M	Missouri Mental	1	61.3% not all right	"Some people feel there is

0	Retardation and Death Penalty Survey, Q. 5 (Oct.1993)	9 9 3	23.7% is all right 15% don't know	nothing wrong with imposing the death penalty on persons who are mentally retarded depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Do you think it IS or IS NOT all right to impose the death penalty on a mentally retarded person?"
N C / S C	Charlotte Observer–WMTV News Poll (Sept.2000) Diane Suchetka, Carolinas Join Emotional Debate Over Executing Mentally Retarded, Charlotte Observer, Sept. 13, 2000	2 0 0 0	64% yes 21% no 14% not sure	"Should the Carolinas ban the execution of people with mental retardation?"
N M	Research & Polling Inc., Use of the Death Penalty Public Opinion Poll, Q. 2 (Dec.1990)	1 9 9	57.1% oppose 10.5% support 26.2% depends 6.1% don't know	62% support the death penalty. Asked of those that support it, "for which of the following do you support use of the death penalty when the convicted person is mentally retarded?"
N Y	Patrick Caddell Enterprises, N.Y. Public Opinion Poll, The Death Penalty: An Executive Summary, Q. 27 (May 1989) Ronald Tabak & J. Mark Lane, The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty, 23 Loyola (LA) L.Rev. 59, 93 (1989)	1 9 8 9	82% oppose 10% favor 9% don't know	"I'd like you to imagine you are a member of a jury. The jury has found the defendant guilty of murder beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty. Would you favor or oppose sentencing the offender to the death penalty if the convicted person were mentally retarded?"
О К	Survey of Oklahoma Attitudes Regarding Capital Punishment: Survey Conducted for Oklahoma Indigent	1 9 9 9	83.5% should not be executed 10.8% should be executed	"Some people think that persons convicted of murder who are mentally retarded (or have a mental age of between 5 and 10 years) should not be executed.

Defense System, Q. C

(July 1999)

122 S.Ct. 2242, 153 L.Ed.2d 335, 70 USLW 4585, 02 Cal. Daily Op. Serv. 5439...

	(44.7 2000)			death penalty like anyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like everyone else?"
T X	Austin American Statesman, Nov. 15, 1988, at B3	1 9 8 8	73% opposed	[not provided]
T X	Sam Houston State University, College of Criminal Justice, Texas Crime Poll On-line (1995) Domingo Ramirez, Jr., Murder Trial May Hinge on Defendant's IQ, The Fort Worth Star—Telegram, Oct. 6, 1997, at 1	1 9 9 5	61% more likely to oppose	"For each of the following items that have been found to affect people's attitude about the death penalty, please state if you would be more likely to favor or more likely to oppose the death penalty, or wouldn't it matter if the murderer is severely mentally retarded?"
T X	Scripps—Howard Texas Poll: Death Penalty (Mar.2001) Dan Parker, Most Texans Support Death Penalty, Corpus Christi Caller—Times, Mar. 2, 2001, at A1	2 0 0 1	66% no 17% yes 17% don't know/no answer	"Should the state use the death penalty when the inmate is considered mentally retarded?"
T X	Houston Chronicle (Feb.2001) Stephen Brewer & Mike Tolson, A Deadly Distinction: Part III, Debate Fervent in Mental Cases, Johnny Paul Penry Illustrates a Lingering Capital Conundrum, The Houston Chronicle, Feb. 6, 2001, at A6	2 0 0 1	59.9% no support 19.3% support 20.7% not sure/no answer	"Would you support the death penalty if you were convinced the defendant were guilty, but the defendant is mentally impaired?"

5.7% depends

Other people think that 'retarded'

persons should be subject to the

U S	Harris Poll, Unfinished Agenda on Race, Q. 32 (Sept.1988) Saundra Torry, High Court to Hear Case on Retarded Slayer, The Washington Post, Jan. 11, 1989, at A6	1 9 8 8	71% should not be executed 21% should be executed 4% depends 3% not sure/refused	"Some people think that persons convicted of murder who have a mental age of less than 18 (or the 'retarded') should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like anyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like anyone else?"
U S	Yankelovich Clancy Shulman, Time/CNN Poll, Q. 14 (July 7, 1989) Samuel R. Gross, Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century, Capital Punishment and the American Future (Feb.2001)	1 9 8 9	61% oppose 27% favor 12% not sure	"Do you favor or oppose the death penalty for mentally retarded individuals convicted of serious crimes, such as murder?"
U S	The Tarrance Group, Death Penalty Poll, Q. 9 (Mar.1993) Samuel R. Gross, Update: American Public Opinion on the Death Penalty—It's Getting Personal, 83 Cornell L.Rev. 1448, 1467 (1998)	1 9 9 3	56% not all right 32% is all right 11% unsure	"Some people feel that there is nothing wrong with imposing the death penalty on persons who are mentally retarded, depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Which of these views comes closest to your own?"
U S	Public Policy Research, Crime in America, Q. 72 (July 1995)	1 9 9 5	67% likely to oppose 7% likely to favor 26% wouldn't matter	"For each item please tell me if you would be more likely to favor the death penalty, more likely to oppose the death penalty or it wouldn't matter if it is true that the murderer is severely mentally retarded?"

U	Princeton Research,	1	83% oppose	"If the convicted person was
S	Newsweek Poll, Q. 16	9	9% favor	mentally retarded, would you
	(Nov.1995)	9	8% don't know	favor or oppose the death
	Samuel R. Gross, Update: American Public Opinion on the Death Penalty—It's Getting Personal, 83 Cornell L.Rev. 1448, 1468 (1998)	5	refused	penalty?"
U	Peter Hart Research	1	58%	" [F]or each proposal I read,
S	Associates, Inc.,	9	strongly/somewh	please tell me whether you
	Innocence Survey, Q. 12	9	at favor	strongly favor, somewhat favor,
	(Dec.1999)	9	26%	have mixed or neutral feelings,
	•		strongly/somewh	somewhat oppose, or strongly
			at oppose	oppose that proposal
			12%	[P]rohibit the death penalty for
			mixed/neutral	defendants who are mentally
			4% not sure	retarded."
U	Peter Hart Research	1	72%	"Suppose you were on a jury and
S	Associates, Inc.,	9	much/somewhat	a defendant was convicted of
	Innocence Survey, Q. 9	9	less likely	murder. Now it is time to
	(Dec.1999)	9	19% no difference	determine the sentence. If you
			9% not sure	knew that the defendant was
			47% much less	mentally retarded or otherwise
			likely	mentally impaired in a serious
			25% somewhat	way, would you be much less
			less	likely to support the use of the
			likely	death penalty in this specific case
				somewhat less likely, or would it make no difference to you?"
U	Houston Chronicle	2	62 8% no support	"Would you support the death
S	(Feb.2001)	0	63.8% no support 16.4% support	penalty if you were convinced the
J	Stephen Brewer & Mike	0	19.8% not	defendant were guilty, but the
	Tolson, A Deadly	1	sure/no	defendant is mentally impaired?"
	Distinction: Part III,	1	answer	determant is mentally impalled:
	Debate Fervent in Mental		unswei	
	Cases, Johnny Paul Penry			
	Illustrates a Lingering			
	Capital Conundrum, The			
	Houston Chronicle, Feb. 6, 2001, at A6			
	υ, 2001, αι Αθ			

and Justice THOMAS join, dissenting.

Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only

does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render *338 an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.

I

I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case. After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

The jury convicted Atkins of capital murder. At resentencing (the Virginia Supreme Court affirmed his conviction but remanded for resentencing because the trial court had used an improper verdict form, 257 Va. 160, 179, 510 S.E.2d 445, 457 (1999)), the jury heard extensive evidence of petitioner's alleged mental retardation. A psychologist testified that petitioner was mildly mentally retarded with an IQ of 59, that he was a "slow learner," App. 444, who showed a "lack of success in pretty much every domain of his life," id., at 442, and that he had an "impaired" capacity to **2260 appreciate the criminality of his conduct and to conform his conduct to the law, id., at 453. Petitioner's family members offered additional evidence in support of his mental retardation claim (e.g., that petitioner is a "follower," id., at 421). The Commonwealth contested the evidence of retardation and presented testimony of a psychologist who found "absolutely no evidence other than the IQ score ... indicating that [petitioner] *339 was in the least bit mentally retarded" and concluded that petitioner was "of average intelligence, at least." Id., at 476.

The jury also heard testimony about petitioner's 16 prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming. *Id.*, at 491–522. The victims of these offenses provided graphic depictions

of petitioner's violent tendencies: He hit one over the head with a beer bottle, *id.*, at 406; he slapped a gun across another victim's face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach, *id.*, at 411–413. The jury sentenced petitioner to death. The Supreme Court of Virginia affirmed petitioner's sentence. 260 Va. 375, 534 S.E.2d 312 (2000).

II

As the foregoing history demonstrates, petitioner's mental retardation was a central issue at sentencing. The jury concluded, however, that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence. "In upsetting this particularized judgment on the basis of a constitutional absolute," the Court concludes that no one who is even slightly mentally retarded can have sufficient "moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution." Thompson v. Oklahoma, 487 U.S. 815, 863-864, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (SCALIA, J., dissenting).

Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), and modes of punishment that are inconsistent with *340 modern " 'standards of decency,' " as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures," *Penry v. Lynaugh*, 492 U.S. 302, 330–331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The Court makes no pretense that execution of the mildly mentally retarded would have been considered "cruel and unusual" in 1791. Only the *severely* or *profoundly* mentally retarded, commonly known as "idiots," enjoyed any special status under the law at that time. They, like lunatics, suffered a "deficiency in will" rendering them unable to tell right from wrong. 4 W. Blackstone, Commentaries on the Laws of England 24 (1769) (hereinafter Blackstone); see also *Penry*, 492 U.S., at 331–332, 109 S.Ct. 2934 ("[T]he term 'idiot' was generally used to describe persons who had a total lack of

reason or understanding, or an inability to distinguish between good and evil"); id., at 333, 109 S.Ct. 2934 (citing sources indicating that idiots generally had an IQ of 25 or below, which would place them within the "profound" or "severe" range of mental retardation under modern standards); 2 A. Fitz-Herbert, Natura Brevium 233B (9th ed. 1794) (originally published 1534) (An idiot is "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss"). Due to their incompetence, idiots were "excuse[d] **2261 from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses." 4 Blackstone 25; see also Penry, supra, at 331, 109 S.Ct. 2934. Instead, they were often committed to civil confinement or made wards of the State, thereby preventing them from "go[ing] loose, to the terror of the king's subjects." 4 Blackstone 25; see also S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 12-14 (3d ed.1985); 1 Blackstone 292-296; 1 M. Hale, Pleas of the Crown 33 (1st Am. ed. 1847). Mentally retarded offenders with less severe impairments-those who were not "idiots"-suffered criminal prosecution *341 and punishment, including capital punishment. See, e.g., I. Ray, Medical Jurisprudence of Insanity 65, 87-92 (W. Overholser ed.1962) (recounting the 1834 trial and execution in Concord. New Hampshire, of an apparent "imbecile"—imbecility being a less severe form of retardation which "differs from idiocy in the circumstance that while in [the idiot] there is an utter destitution of every thing like reason, [imbeciles] possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind"); A. Highmore, Law of Idiocy and Lunacy 200 (1807) ("The great difficulty in all these cases, is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions ...").

The Court is left to argue, therefore, that execution of the mildly retarded is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (Warren, C. J.). Before today, our opinions consistently emphasized that Eighth Amendment judgments regarding the existence of social "standards" "should be informed by objective factors to the maximum possible extent" and "should not be, or appear to be, merely the subjective views of individual Justices." *Coker v. Georgia*, 433 U.S. 584, 592,

97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion); see also *Stanford v. Kentucky*, 492 U.S. 361, 369, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 300, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Enmund v. Florida*, 458 U.S. 782, 788, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). "First" among these objective factors are the "statutes passed by society's elected representatives," *Stanford v. Kentucky, supra*, at 370, 109 S.Ct. 2969; because it "will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives," *Thompson, supra*, at 865, 108 S.Ct. 2687 (SCALIA, J., dissenting).

*342 The Court pays lipservice to these precedents as it miraculously extracts a "national consensus" forbidding execution of the mentally retarded, ante, at 2250, from the fact that 18 States—less than half (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded. Even that 47% figure is a distorted one. If one is to say, as the Court does today, that all executions of the mentally retarded are so morally repugnant as to violate our national "standards of decency," surely the "consensus" it points to must be one that has set its righteous face against all such executions. Not 18 States, but only 7—18% of death penalty jurisdictions—have legislation of that scope. Eleven of those that the Court counts enacted statutes prohibiting execution of mentally retarded defendants convicted after, or convicted of crimes committed after, the effective date of the legislation; those already on death row, **2262 or consigned there before the statute's effective date, or even (in those States using the date of the crime as the criterion of retroactivity) tried in the future for murders committed many years ago, could be put to death. That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches. Two of these States permit execution of the mentally retarded in other situations as well: Kansas apparently permits execution of all *343 except the severely mentally retarded;2New York permits execution of the mentally retarded who commit murder in a correctional facility. N.Y.Crim. Proc. Law § 400.27.12(d) (McKinney 2001); N.Y. Penal Law § 125.27 (McKinney 2002).

But let us accept, for the sake of argument, the Court's faulty count. That bare number of States alone—18—should be enough to convince any reasonable person that no "national consensus" exists. How is it possible that agreement among 47% of the death penalty jurisdictions amounts to "consensus"? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual

on "evolving standards" grounds. In Coker, supra, at 595–596, 97 S.Ct. 2861, we proscribed the death penalty for rape of an adult woman after finding that only one jurisdiction, Georgia, authorized such a punishment. In Enmund, supra, at 789, 102 S.Ct. 3368, we invalidated the death penalty for mere participation in a robbery in which an accomplice took a life, a punishment not permitted in 28 of the death penalty States (78%). In Ford, 477 U.S., at 408, 106 S.Ct. 2595, we supported the common-law prohibition of execution of the insane with the observation that "[t]his ancestral legacy has not outlived its time," since not a single State authorizes such punishment. In Solem v. Helm, 463 U.S. 277, 300, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), we invalidated a life sentence without parole under a recidivist statute by which the criminal "was treated more severely than he would have been in any other State." What the Court calls evidence of "consensus" in the present case (a fudged 47%) more closely resembles evidence that we found inadequate *344 to establish consensus in earlier cases. Tison v. Arizona, 481 U.S. 137, 154, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), upheld a state law authorizing capital punishment for major participation in a felony with reckless indifference to life where only 11 of the 37 death penalty States (30%) prohibited such punishment. Stanford, 492 U.S., at 372, 109 S.Ct. 2969, upheld a state law permitting execution of defendants who committed a capital crime at age 16 where only 15 of the 36 death penalty States (42%) prohibited death for such offenders.

Moreover, a major factor that the Court entirely disregards is that the legislation of all 18 States it relies on is still in its infancy. The oldest of the statutes is only 14 years old;³ five were enacted last **2263 year;⁴ over half were enacted within the past eight years.⁵ Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term. It is "myopic to base sweeping constitutional principles upon the narrow experience of [a few] years." *Coker*, 433 U.S., at 614, 97 S.Ct. 2861 (Burger, C. J., dissenting); see also *Thompson*, 487 U.S., at 854–855, 108 S.Ct. 2687 (O'CONNOR, J., concurring in judgment).

The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the *consistency* of the direction of change." *Ante*, at 2249 (emphasis added). But in what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound* *345 to be in the one direction the Court finds significant enough to overcome the lack of real consensus. That is to say, to be accurate the Court's

"consistency-of-the-direction-of-change" point should be recast into the following unimpressive observation: "No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years." In any event, reliance upon "trends," even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication, as Justice O'CONNOR eloquently explained in *Thompson:*

"In 1846, Michigan became the first State to abolish the death penalty In succeeding decades, other American States continued the trend towards abolition Later, and particularly after World War II, there ensued a steady and dramatic decline in executions In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968

"In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus.... We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject." 487 U.S., at 854–855, 108 S.Ct. 2687.

Her words demonstrate, of course, not merely the peril of riding a trend, but also the peril of discerning a consensus where there is none.

*346 The Court's thrashing about for evidence of "consensus" includes reliance upon the margins by which state legislatures have enacted bans on execution of the retarded. Ante, at 2249. Presumably, in applying our Eighth Amendment "evolving-standards-of-decency" jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed by how much. Of course if the percentage of legislators voting for the bill is significant, surely the number of people represented by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted against the bill should be more impressive than the fact that 90% of the legislators in **2264 a State with a population of 2 million voted for it. (By the way, the population of the death penalty States that exclude the mentally retarded is only 44% of the population of all

death penalty States. U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 21 (121st ed.2001).) This is quite absurd. What we have looked for in the past to "evolve" the Eighth Amendment is a consensus of the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.

Even less compelling (if possible) is the Court's argument, ibid., that evidence of "national consensus" is to be found in the infrequency with which retarded persons are executed in States that do not bar their execution. To begin with, what the Court takes as true is in fact quite doubtful. It is not at all clear that execution of the mentally retarded is "uncommon," ibid., as even the sources cited by the Court suggest, see ante, at 2249, n. 20 (citing D. Keyes, W. Edwards, & R. Perske, People with Mental Retardation are Dying Legally, 35 Mental Retardation (Feb.1997) (updated by Death Penalty Information Center, available http://www.advocacyone.org/ deathpenalty.html (as visited *347 June 12, 2002) (showing that 12 States executed 35 allegedly mentally retarded offenders during the period 1984-2000)). See also Bonner & Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N.Y. Times, Aug. 7, 2000, p. A1 (reporting that 10% of death row inmates are retarded). If, however, execution of the mentally retarded is "uncommon"; and if it is not a sufficient explanation of this that the retarded constitute a tiny fraction of society (1% to 3%), Brief for American Psychological Association et al. as Amici Curiae 7; then surely the explanation is that mental retardation is a constitutionally mandated mitigating factor at sentencing, Penry, 492 U.S., at 328, 109 S.Ct. 2934. For that reason, even if there were uniform national sentiment in *favor* of executing the retarded in appropriate cases, one would still expect execution of the mentally retarded to be "uncommon." To adapt to the present case what the Court itself said in Stanford, 492 U.S., at 374, 109 S.Ct. 2969: "[I]t is not only possible, but overwhelmingly probable, that the very considerations which induce [today's majority] to believe that death should *never* be imposed on [mentally retarded] offenders ... cause prosecutors and juries to believe that it should rarely be imposed."

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. *Ante*, at 2249–2250, n. 21. I agree with THE CHIEF JUSTICE, *ante*, at 2254–2256

(dissenting opinion), that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the *348 "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. ... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Thompson*, **2265 487 U.S., at 868–869, n. 4, 108 S.Ct. 2687 (SCALIA, J., dissenting).

Ш

Beyond the empty talk of a "national consensus," the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) nor even by the current moral sentiments of the American people. "'[T]he Constitution,' the Court says, 'contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' " Ante, at 2247 (quoting Coker, 433 U.S., at 597, 97 S.Ct. 2861) (emphasis added). (The unexpressed reason for this unexpressed "contemplation" of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.) The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. " '[I]n the end,' " Thompson, supra, at 823, n. 8 (plurality opinion (quoting Coker, supra, at 597 (plurality opinion))), it is the feelings and intuition of a majority of the Justices that count—"the perceptions of decency, or of penology, or of mercy, entertained ... by a majority of the small and *349 unrepresentative segment of our society that sits on this Court." Thompson, supra, at 873, 108 S.Ct. 2687 (SCALIA, J., dissenting).

The genuinely operative portion of the opinion, then, is the Court's statement of the reasons why it agrees with the contrived consensus it has found, that the "diminished capacities" of the mentally retarded render the death penalty excessive. *Ante*, at 2250–2252. The Court's analysis rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to account properly for the "diminished capacities" of the

retarded. The first assumption is wrong, as I explained at length in Harmelin v. Michigan, 501 U.S. 957, 966-990, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.). The Eighth Amendment is addressed to always-and-everywhere "cruel" punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible, "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." Id., at 990, 111 S.Ct. 2680. The second assumption—inability of judges or juries to take proper mental retardation—is account of unsubstantiated, but contradicts the immemorial belief. here and in England, that they play an indispensable role in such matters:

"[I]t is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes" 1 Hale, Pleas of the Crown, at 30.

Proceeding from these faulty assumptions, the Court gives two reasons why the death penalty is an excessive punishment for all mentally retarded offenders. First, the "diminished *350 capacities" of the mentally retarded raise a "serious question" whether their execution contributes to the "social purposes" of the death penalty, viz., retribution and deterrence. Ante, at 2250-2251. (The Court conveniently ignores a third "social purpose" of the death penalty—"incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future," **2266 Gregg v. Georgia, 428 U.S. 153, 183, n. 28, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). But never mind; its discussion of even the other two does not bear analysis.) Retribution is not advanced, the argument goes, because the mentally retarded are no more culpable than the average murderer, whom we have already held lacks sufficient culpability to warrant the death penalty, see Godfrey v. Georgia, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). Ante, at 2251. Who says so? Is there an established correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.

Assuming, however, that there is a direct connection between diminished intelligence and the inability to refrain from murder, what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is "no more culpable" than the "average" murderer in a holdup-gone-wrong or a domestic dispute? Or a moderately retarded individual who commits a series of 20 exquisite torture-killings? Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime—which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today *351 imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none. Once the Court admits (as it does) that mental retardation does not render the offender morally blameless, ante, at 2250-2251, there is no basis for saying that the death penalty is never appropriate retribution, no matter how heinous the crime. As long as a mentally retarded offender knows "the difference between right and wrong," ante, at 2250, only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.

As for the other social purpose of the death penalty that the Court discusses, deterrence: That is not advanced, the Court tells us, because the mentally retarded are "less likely" than their non-retarded counterparts to "process the information of the possibility of execution as a penalty and ... control their conduct based upon that information." Ante, at 2251. Of course this leads to the same conclusion discussed earlier-that the mentally retarded (because they are less deterred) are more likely to kill-which neither I nor the society at large believes. In any event, even the Court does not say that all mentally retarded individuals cannot "process the information of the possibility of execution as a penalty and ... control their conduct based upon that information"; it merely asserts that they are "less likely" to be able to do so. But surely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class. Virginia's death penalty, for example, does not fail of its deterrent effect simply because some criminals are

unaware that Virginia has the death penalty. In other words, the supposed fact that some *352 retarded criminals cannot fully appreciate the death penalty has nothing to do with the deterrence rationale, but is simply an echo of the arguments denying a retribution rationale, discussed and rejected **2267 above. I am not sure that a murderer is somehow less blameworthy if (though he knew his act was wrong) he did not fully appreciate that he could die for it; but if so, we should treat a mentally retarded murderer the way we treat an offender who may be "less likely" to respond to the death penalty because he was abused as a child. We do not hold him immune from capital punishment, but require his background to be considered by the sentencer as a mitigating factor. Eddings v. Oklahoma, 455 U.S. 104, 113-117, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The Court throws one last factor into its grab bag of reasons why execution of the retarded is "excessive" in all cases: Mentally retarded offenders "face a special risk of wrongful execution" because they are less able "to make a persuasive showing of mitigation," "to give meaningful assistance to their counsel," and to be effective witnesses. Ante, at 2252. "Special risk" is pretty flabby language (even flabbier than "less likely")—and I suppose a similar "special risk" could be said to exist for just plain stupid people, inarticulate people, even ugly people. If this unsupported claim has any substance to it (which I doubt), it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an Eighth Amendment claim that execution of the mentally retarded is cruel and unusual. We have never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative.

* * *

Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. None of those *353 requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. They include prohibition of the death penalty for "ordinary" murder, Godfrey, 446 U.S., at 433, 100 S.Ct. 1759, for rape of an adult woman, Coker, 433 U.S., at 592, 97 S.Ct. 2861, and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind, Enmund, 458 U.S., at 801, 102 S.Ct. 3368; prohibition of the death penalty for any person under the age of 16 at the time of the crime, Thompson, 487 U.S., at 838, 108 S.Ct. 2687 (plurality

opinion); prohibition of the death penalty as the mandatory punishment for any crime, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), Sumner v. Shuman, 483 U.S. 66, 77-78, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); a requirement that the sentencer not be given unguided discretion, Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam), a requirement that the sentencer be empowered to take into account all mitigating circumstances, Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), Eddings v. Oklahoma, supra, at 110, 102 S.Ct. 869; and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed, Ford, 477 U.S., at 410–411, 106 S.Ct. 2595 (plurality opinion). There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association on Mental Retardation and the American Psychiatric Association (set forth in the Court's opinion, ante, at 2245, n. 3) to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), **2268 Jones v. United States, 463 U.S. 354, 370, and n. 20, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), the capital defendant who feigns mental retardation risks nothing at all. The mere pendency *354 of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions. that they are retarded. See, e.g., Moore v. Texas, 535 U.S. 1044, 122 S.Ct. 1814, 152 L.Ed.2d 668 (2002) (SCALIA, J., dissenting from grant of applications for stay of execution).

Perhaps these practical difficulties will not be experienced by the minority of capital-punishment States that have very recently changed mental retardation from a mitigating factor (to be accepted or rejected by the sentencer) to an absolute immunity. Time will tell—and the brief time those States have had the new disposition in place (an average of 6.8 years) is surely not enough. But if the practical difficulties do not appear, and if the other States share the Court's perceived moral consensus that all mental retardation renders the death penalty inappropriate for all crimes, then that majority will presumably follow suit. But there is no justification for this Court's pushing them into the experiment—and turning the experiment into a permanent practice—on

constitutional pretext. Nothing has changed the accuracy of Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors, written over three centuries ago:

"[Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability ... and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses. ...

"Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses ..., and by the inspection and direction of the judge." 1 Pleas of the Crown, at 32–33.

I respectfully dissent.

All Citations

536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, 70 USLW 4585, 02 Cal. Daily Op. Serv. 5439, 2002 Daily Journal D.A.R. 6937, 15 Fla. L. Weekly Fed. S 397

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty.
- Highly damaging to the credibility of Atkins' testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities.
- The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).
 - The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70. *Id.*, at 42–43.
- The doctor interviewed Atkins, members of his family, and deputies at the jail where he had been incarcerated for the preceding 18 months. Dr. Nelson also reviewed the statements that Atkins had given to the police and the investigative reports concerning this case.
- Dr. Nelson administered the Wechsler Adult Intelligence Scales test (WAIS–III), the standard instrument in the United States for assessing intellectual functioning. AAMR, Mental Retardation, *supra*. The WAIS–III is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. A. Kaufman & E. Lichtenberger, Essentials of WAISIII Assessment 60 (1999). It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds. 7th ed.2000).

At the sentencing phase, Dr. Nelson testified: "[Atkins'] full scale IQ is 59. Compared to the population at large, that means less than one percentile Mental retardation is a relatively rare thing. It's about one percent of the population." App. 274.

According to Dr. Nelson, Atkins' IQ score "would automatically qualify for Social Security disability income." *Id.*, at 280. Dr. Nelson also indicated that of the over 40 capital defendants that he had evaluated, Atkins was only the second individual who met the criteria for mental retardation. *Id.*, at 310. He testified that, in his opinion, Atkins' limited intellect had been a consistent feature throughout his life, and that his IQ score of 59 is not an "aberration, malingered result, or invalid test score." *Id.*, at 308.

- Dr. Samenow's testimony was based upon two interviews with Atkins, a review of his school records, and interviews with correctional staff. He did not administer an intelligence test, but did ask Atkins questions taken from the 1972 version of the Wechsler Memory Scale. *Id.*, at 524–525, 529. Dr. Samenow attributed Atkins' "academic performance [that was] by and large terrible" to the fact that he "is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." *Id.*, at 480–481.
- 7 Thus, we have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.
- Jerome Bowden, who was identified as having mental retardation when he was 14 years old, was scheduled for imminent execution in Georgia in June 1986. The Georgia Board of Pardons and Paroles granted a stay following public protests over his execution. A psychologist selected by the State evaluated Bowden and determined that he had an IQ of 65, which is consistent with mental retardation. Nevertheless, the board lifted the stay and Bowden was executed the following day. The board concluded that Bowden understood the nature of his crime and his punishment and therefore that execution, despite his mental deficiencies, was permissible. See Montgomery, Bowden's Execution Stirs Protest, Atlanta Journal, Oct. 13, 1986, p. A1.
- 9 Ga.Code Ann. § 17–7–131(j) (Supp.1988).
- The Anti–Drug Abuse Act of 1988, Pub.L. 100–690, § 7001(/), 102 Stat. 4390, 21 U.S.C. § 848(/). Congress expanded the federal death penalty law in 1994. It again included a provision that prohibited any individual with mental retardation from being sentenced to death or executed. Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c).
- 11 Md. Ann.Code, Art. 27, § 412(f)(1) (1989).
- 12 Ky.Rev.Stat. Ann. §§ 532.130, 532.135, 532.140; Tenn.Code Ann. § 39–13–203; N.M. Stat. Ann. § 31–20A–2.1; Ark.Code Ann. § 5–4–618; Colo.Rev.Stat. § 16–9–401; Wash. Rev.Code § 10.95.030; Ind.Code §§ 35–36–9–2 through 35–36–9–6; Kan. Stat. Ann. § 21–4623.
- N.Y.Crim. Proc. Law § 400.27. However, New York law provides that a sentence of death "may not be set aside ... upon the ground that the defendant is mentally retarded" if "the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution." N.Y.Crim. Proc. Law § 400.27.12(d) (McKinney 2001–2002 Interim Pocket Part).
- 14 Neb.Rev.Stat. § 28–105.01.
- 15 S.D. Codified Laws § 23A–27A–26.1; Ariz.Rev.Stat. Ann. § 13–703.02; Conn. Gen.Stat. § 53a–46a; Fla. Stat. § 921.137; Mo.Rev.Stat. § 565.030; 2001–346 N.C. Sess. Laws p. 45.
- House Bill No. 236 passed the Texas House on April 24, 2001, and the Senate version, S. 686, passed the Texas Senate on May 16, 2001. Governor Perry vetoed the legislation on June 17, 2001. In his veto statement, the Texas Governor did not express dissatisfaction with the principle of categorically excluding the mentally retarded from the death penalty. In fact, he stated: "We do not execute mentally retarded murderers today." See Veto Proclamation for H.B. No. 236. Instead, his motivation to veto the bill was based upon what he perceived as a procedural flaw: "My opposition to this legislation focuses on a serious legal flaw in the bill. House Bill No. 236 would create a system whereby the jury and judge are asked to make the same determination based on two different sets of facts Also of grave concern is the fact that the provision that sets up this legally flawed process never received a public hearing during the legislative process." *Ibid*.
- 17 Virginia Senate Bill No. 497 (2002); House Bill No. 957 (2002); see also Nevada Assembly Bill 353 (2001). Furthermore, a commission on capital punishment in Illinois has recently recommended that Illinois adopt a statute prohibiting the execution of

- mentally retarded offenders. Report of the Governor's Commission on Capital Punishment 156 (Apr. 2002).
- A comparison to *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty. Mont.Code Ann. § 45–5–102 (1999); Ind.Code § 35–50–2–3 (1998).
- 19 App. D to Brief for AAMR et al. as Amici Curiae.
- Those States are Alabama, Texas, Louisiana, South Carolina, and Virginia. D. Keyes, W. Edwards, & R. Perske, People with Mental Retardation are Dying Legally, 35 Mental Retardation (Feb.1997) (updated by Death Penalty Information Center, available at http://www.advocacyone.org/deathpenalty. html (as visited June 18, 2002).
- 21 Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as Amici Curiae; Brief for AAMR et al. as Amici Curiae. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." Brief for United States Catholic Conference et al. as Amici Curiae 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as Amicus Curiae 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. Bonner & Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N.Y. Times, Aug. 7, 2000, p. A1; App. B to Brief for AAMR, et al. as Amici Curiae (appending approximately 20 state and national polls on the issue). Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue. See Thompson v. Oklahoma, 487 U.S. 815, 830, 831, n. 31, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").
- The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, supra.
- J. McGee & F. Menolascino, The Evaluation of Defendants with Mental Retardation in the Criminal Justice System, in The Criminal Justice System and Mental Retardation 55, 58–60 (R. Conley, R. Luckasson, & G. Bouthilet eds.1992); Appelbaum & Appelbaum, Criminal–Justice Related Competencies in Defendants with Mental Retardation, 14 J. of Psychiatry & L. 483, 487–489 (Winter 1994).
- See, e.g., Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L.Rev. 414, 429 (1985); Levy–Shiff, Kedem, & Sevillia, Ego Identity in Mentally Retarded Adolescents, 94 Am. J. Mental Retardation 541, 547 (1990); Whitman, Self Regulation and Mental Retardation, 94 Am. J. Mental Retardation 347, 360 (1990); Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation, 37 Mental Retardation 212, 212–213, 535 (1999) (hereinafter Everington & Fulero).
- See Everington & Fulero 212–213. Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit. See Baker, Death–Row Inmate Gets Clemency; Agreement Ends Days of Suspense, Washington Post, Jan. 15, 1994, p. A1.
- * Apparently no such statistics exist. See Brief for American Association on Mental Retardation et al. as *Amici Curiae* 19, n. 29 (noting that "actions by individual prosecutors and by juries are difficult to quantify with precision"). Petitioner's inability to muster studies in his favor ought to cut against him, for it is his "heavy burden," *Stanford v. Kentucky*, 492 U.S. 361, 373, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (internal quotation marks omitted), to establish a national consensus against a punishment deemed acceptable by the Virginia Legislature and jury who sentenced him. Furthermore, it is worth noting that experts have estimated that as many as 10 percent of death row inmates are mentally retarded, see R. Bonner & S. Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N.Y. Times, Aug. 7, 2000, p. A1, a number which suggests that sentencing juries are not as

reluctant to impose the death penalty on defendants like petitioner as was the case in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

- See Ariz.Rev.Stat. Ann. § 13–703.02(I) (Supp.2001); Ark.Code Ann. § 5–4–618(d)(1) (1997); Reams v. State, 322 Ark. 336, 340, 909 S.W.2d 324, 326–327 (1995); Fla. Stat. § 921.137(8) (Supp.2002); Ga.Code Ann. § 17–7–131(j) (1997); Ind.Code § 35–36–9–6 (1998); Rondon v. State, 711 N.E.2d 506, 512 (Ind.1999); Kan. Stat. Ann. §§ 21–4623(d), 21–4631(c) (1995); Ky.Rev.Stat. Ann. § 532.140(3) (1999); Md. Ann.Code, Art. 27, § 412(g) (1996); Booth v. State, 327 Md. 142, 166–167, 608 A.2d 162, 174 (1992); Mo.Rev.Stat. § 565.030(7) (Supp.2001); N.Y.Crim. Proc. Law § 400.27.12(c) (McKinney Supp.2002); 1995 N.Y. Laws, ch. 1, § 38; Tenn.Code Ann. § 39–13–203(b) (1997); Van Tran v. State, 66 S.W.3d 790, 798–799 (Tenn.2001).
- The Kansas statute defines "mentally retarded" as "having significantly subaverage general intellectual functioning ... to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." Kan. Stat. Ann. § 21–4623(e) (2001). This definition of retardation, petitioner concedes, is analogous to the Model Penal Code's definition of a "mental disease or defect" excusing responsibility for criminal conduct, see ALI, Model Penal Code § 4.01 (1985), which would not include mild mental retardation. Reply Brief for Petitioner 3, n. 4.
- 3 Ga.Code Ann. § 17–7–131(j).
- 4 Ariz.Rev.Stat. Ann. § 13–703.02; Conn. Gen.Stat. § 53a–46a(h); Fla. Stat. § 921.137; Mo.Rev.Stat. §§ 565.030(4)-(7); N.C. Gen.Stat. § 15A–2005.
- In addition to the statutes cited n. 4 *supra*, see S.D. Codified Laws § 23A–27A–26.1 (enacted 2000); Neb.Rev.Stat. §§ 28–105.01(2)–(5) (1998); N.Y.Crim. Proc. Law § 400.27(12) (1995); Ind.Code § 35–36–9–6 (1994); Kan. Stat. Ann. § 21–4623 (1994).
- And in some cases positively counterindicative. The Court cites, for example, the views of the United States Catholic Conference, whose members are the active Catholic Bishops of the United States. See *ante*, at 2249–2250, n. 21 (citing Brief for United States Catholic Conference et al. as *Amici Curiae* 2). The attitudes of that body regarding crime and punishment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Cain v. Chappell, 9th Cir.(Cal.), September 13, 2017
137 S.Ct. 1039
Supreme Court of the United States

Bobby James MOORE, Petitioner v. TEXAS.

No. 15–797. | Argued Nov. 29, 2016. | Decided March 28, 2017.

Synopsis

Background: After affirmance of state prisoner's capital murder conviction and death sentence, 700 S.W.2d 193, prisoner petitioned for federal habeas relief. The United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., granted relief from sentence. State appealed. The United States Court of Appeals for the Fifth Circuit, DeMoss, Circuit Judge, 194 F.3d 586, affirmed as modified, and remanded. Thereafter, the 185th Judicial District Court of Texas, Harris County, sentenced prisoner to death. Prisoner appealed. The Texas Court of Criminal Appeals, 2004 WL 231323, affirmed. Prisoner sought a state writ of habeas corpus. A state habeas judge recommended granting relief in part and denying relief in part. The Texas Court of Criminal Appeals, 470 S.W.3d 481, denied habeas relief. Certiorari was granted in part.

Holdings: The Supreme Court, Justice Ginsburg, held that:

- [1] the *Briseno* factors adopted by Texas Court of Criminal Appeals, for evaluating an *Atkins* claim, are based on superseded medical standards that create an unacceptable risk that a person with intellectual disabilities will be executed in violation of the Eighth Amendment, abrogating *Ex parte Briseno*, 135 S.W.3d 1, *Commonwealth v. Bracey*, 632 Pa. 75, 117 A.3d 270, and *Howell v. State*, 2011 WL 2420378;
- ^[2] unique sources of imprecision in administering the prisoner's IQ tests were not relevant;

- state court deviated from prevailing clinical standards by overemphasizing prisoner's perceived adaptive strengths; and
- ^[4] consensus of state citizens regarding who should be exempted from the death penalty, based on lay perceptions of intellectual disability, was not a proper consideration.

Vacated and remanded.

Chief Justice Roberts filed a dissenting opinion, in which Justices Thomas and Alito joined.

West Headnotes (13)

[1] Habeas Corpus

Questions of law and fact

Under Texas law, the Texas Court of Criminal Appeals (CCA), not the court of first instance, is the ultimate factfinder in habeas corpus proceedings. Vernon's Ann.Texas Const. Art. 5, § 5.

2 Cases that cite this headnote

Sentencing and Punishment ←Mentally retarded persons

The *Briseno* factors adopted by Texas Court of Criminal Appeals, for evaluating an *Atkins* claim, rely on superseded medical standards that create an unacceptable risk that a person with intellectual disabilities will be executed in violation of the Eighth Amendment's protection against cruel and unusual punishments, and thus, the *Briseno* factors cannot be used to restrict the qualification of an individual as intellectually disabled; abrogating *Ex parte Briseno*, 135 S.W.3d 1, *Commonwealth v. Bracey*, 632 Pa. 75, 117 A.3d 270, and *Howell v. State*, 2011 WL 2420378. U.S.C.A. Const.Amend. 8.

2 Cases that cite this headnote

[3] Sentencing and Punishment

Mentally retarded persons

Adjudications of intellectual disability that preclude execution, under the Eighth Amendment's protection against cruel and unusual punishments, should be informed by the views of medical experts, and that instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[4] Sentencing and Punishment

Cruel and Unusual Punishment in General

The Eighth Amendment prohibits cruel and unusual punishments, and reaffirms the duty of the government to respect the dignity of all persons. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[5] Sentencing and Punishment

Scope of Prohibition

To enforce the protection of human dignity under the Eighth Amendment's prohibition of cruel and unusual punishments, courts look to the evolving standards of decency that mark the progress of a maturing society, recognizing that the Eighth Amendment is not fastened to the obsolete, U.S.C.A. Const.Amend, 8.

Cases that cite this headnote

Mentally retarded persons

The Eighth Amendment's prohibition of cruel and unusual punishments restricts the State's power to take the life of any intellectually disabled individual; executing intellectually disabled individuals runs up against a national consensus against the practice and creates a risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[7] Sentencing and Punishment

←Mentally retarded persons

While it is left to the States to develop appropriate ways to enforce the Eighth Amendment's restriction on executing the intellectually disabled, States' discretion is not unfettered, and even if the views of medical do not dictate experts a court's intellectual-disability determination, determination must be informed by the medical community's diagnostic framework, though adherence to everything stated in the latest medical guide is not demanded. U.S.C.A. Const. Amend. 8.

9 Cases that cite this headnote

[8] Sentencing and Punishment

←Mentally retarded persons

When adjudicating whether an individual has an intellectual disability that precludes execution, under the Eighth Amendment's protection against cruel and unusual punishments, if an IQ score is close to, but above, 70, courts must account for the test's standard error of measurement. U.S.C.A. Const.Amend. 8.

5 Cases that cite this headnote

[6] Sentencing and Punishment

[9] Sentencing and Punishment ←Mentally retarded persons

State prisoner's IQ score of 74, adjusted for the standard error of measurement, yielded an IQ range of 69 to 79, for which the lower end fell at or below 70, and thus, the state court adjudicating the prisoner's *Atkins* claim that he had an intellectual disability that precluded execution was required to move on to consider the prisoner's adaptive functioning, even if there were unique sources of imprecision in administering the prisoner's IQ tests; such unique sources of imprecision could not narrow the test-specific standard-error range. U.S.C.A. Const.Amend. 8.

7 Cases that cite this headnote

[10] Sentencing and Punishment ←Mentally retarded persons

In evaluating the state prisoner's adaptive functioning, as factor for determining whether prisoner had an intellectual disability that precluded execution, the state court deviated from prevailing clinical standards by overemphasizing prisoner's perceived adaptive strengths, such as living on the streets, mowing lawns, playing pool for money, and improved behavior in prison; the medical community focused the adaptive-functioning inquiry on adaptive deficits, and clinicians cautioned against reliance on adaptive strengths developed in a controlled setting such as a prison. U.S.C.A. Const.Amend. 8.

10 Cases that cite this headnote

[11] Sentencing and Punishment ←Mentally retarded persons

State court, in concluding that state prisoner did not suffer significant adaptive deficits, as factor for determining whether prisoner had an intellectual disability that precluded execution, deviated from prevailing clinical standards by concluding that prisoner's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related; prisoner's traumatic experiences counted in the medical community as risk factors for intellectual disability, and clinicians relied on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination. U.S.C.A. Const.Amend. 8.

15 Cases that cite this headnote

[12] Sentencing and Punishment ← Mentally retarded persons

Requiring state prisoner to show that his adaptive deficits were not related to a personality disorder was an impermissible deviation from prevailing clinical standards, when state court evaluated prisoner's Atkins claim that he had an intellectual disability that precluded execution: mental-health professionals recognized that many intellectually disabled people also had other mental or physical impairments, and coexisting frequently encountered conditions intellectually disabled individuals had been described in clinical literature as comorbidities. U.S.C.A. Const. Amend. 8.

3 Cases that cite this headnote

[13] Sentencing and Punishment ←Mentally retarded persons

The consensus of state citizens regarding who should be exempted from the death penalty, based on lay perceptions of intellectual disability, was not a proper consideration when determining whether state prisoner had an intellectual disability that precluded execution; the medical profession had endeavored to counter lay stereotypes of the intellectually disabled, and even if mild levels of intellectual

disability fell outside of state citizens' consensus, the state could not execute anyone in the entire category of intellectually disabled offenders. U.S.C.A. Const.Amend. 8.

18 Cases that cite this headnote

1041 Syllabus

Petitioner Moore was convicted of capital murder and sentenced to death for fatally shooting a store clerk during a botched robbery that occurred when Moore was 20 years old. A state habeas court subsequently determined that, under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, and Hall v. Florida, 572 U.S. -, 134 S.Ct. 1986, 188 L.Ed.2d 1007, Moore qualified as intellectually disabled and that his death sentence therefore violated the Eighth Amendment's proscription of "cruel and unusual punishments." The court consulted current medical diagnostic standards—the 11th edition of American Association on Intellectual Developmental Disabilities clinical manual (AAIDD–11) and the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. The habeas court followed the generally accepted intellectual-disability definition, which identifies three core elements: (1) intellectual-functioning deficits, (2) adaptive deficits, and (3) the onset of these deficits while still a minor. Moore's IQ scores, the court determined. established subaverage intellectual functioning. The court credited six scores, the average of *1042 which (70.66) indicated mild intellectual disability. And relying on testimony from mental-health professionals, the court found significant adaptive deficits in all three skill sets (conceptual, social, and practical). Based on its findings, the habeas court recommended to the Texas Court of Criminal Appeals (CCA) that Moore be granted relief. The CCA declined to adopt the judgment recommended by the habeas court. The CCA held instead that the habeas court erred by not following the CCA's 2004 decision in Ex parte Briseno, 135 S.W.3d 1, which adopted the definition of, and standards for assessing, intellectual disability contained in the 1992 (ninth) edition of the American Association on Mental Retardation manual (AAMR-9), predecessor to the current AAIDD-11 manual. Briseno also incorporated the AAMR-9's requirement that adaptive deficits must be "related" to intellectual-functioning deficits, and it recited, without citation to any medical or judicial authority, seven evidentiary factors relevant to the intellectual-disability inquiry. Based on only two of Moore's IQ scores (of 74 and 78), the CCA concluded that Moore had not shown significantly subaverage intellectual functioning. And even if he had, the CCA continued, his adaptive strengths undercut any adaptive weaknesses. The habeas court also failed, the CCA determined, to inquire into relatedness. Among alternative causes for Moore's adaptive deficits, the CCA suggested, were an abuse-filled childhood, undiagnosed learning disorders, multiple elementary-school transfers, racially motivated harassment and violence at school, and a history of academic failure, drug abuse, and absenteeism. *Briseno* 's seven evidentiary factors, the CCA further determined, weighed against finding that Moore had satisfied the relatedness requirement.

Held: By rejecting the habeas court's application of medical guidance and by following the *Briseno* standard, including the nonclinical *Briseno* factors, the CCA's decision does not comport with the Eighth Amendment and this Court's precedents. Pp. 1048 – 1053.

- (a) The Eighth Amendment, which " 'reaffirms the duty of the government to respect the dignity of all persons," " Hall, 572 U.S., at ——, 134 S.Ct., at 1992 prohibits the execution of any intellectually disabled individual, Atkins, 536 U.S., at 321, 122 S.Ct. 2242. While Atkins and Hall left to the States "the task of developing appropriate ways to enforce" the restriction on executing the intellectually disabled, Hall, 572 U.S., at —, 134 S.Ct., at 1999 (internal quotation marks omitted), States' discretion is not "unfettered," id., at ----, 134 S.Ct., at 1998 and must be "informed by the medical community's diagnostic framework," id., at —— – —, 134 S.Ct., at 2000. Relying on the most recent (and still current) versions of the leading diagnostic manuals, the Court concluded in Hall that Florida had "disregard[ed] established medical practice," id., at —, 134 S.Ct., at 1995 and had parted ways with practices and trends in other States, id., at --, 134 S.Ct., at 1995–1998. *Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does precedent license disregard of current medical standards. Pp. 1048 – 1049.

- (c) The CCA's consideration of Moore's adaptive functioning also deviated from prevailing clinical standards and from the older clinical standards the CCA deemed applicable. Pp. 1050-1052.
- (1) The CCA overemphasized Moore's perceived adaptive strengths—living on the streets, mowing lawns, and playing pool for money—when the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. The CCA also stressed Moore's improved behavior in prison, but clinicians caution against reliance on adaptive strengths developed in controlled settings. Pp. 1050 1051.
- (2) The CCA further concluded that Moore's record of academic failure, along with a history of childhood abuse and suffering, detracted from a determination that his intellectual and adaptive deficits were related. The medical community, however, counts traumatic experiences as risk factors for intellectual disability. The CCA also departed from clinical practice by requiring Moore to show that his adaptive deficits were not related to "a personality disorder." Mental-health professionals recognize that intellectually disabled people may have other co-existing mental or physical impairments, including, e.g., attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism. Pp. 1050 -1051.
- (3) The CCA's attachment to the seven *Briseno* evidentiary factors further impeded its assessment of Moore's adaptive functioning. By design and in operation, the lay perceptions advanced by *Briseno* "creat[e] an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S., at ——, 134 S.Ct., at 1990. The medical profession has endeavored to counter lay stereotypes, and the *Briseno* factors are an outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in contexts other than the death penalty. Pp. 1051 1052.
- (d) States have some flexibility, but not "unfettered discretion," in enforcing *Atkins* 'holding, *Hall*, 572 U.S., at —, 134 S.Ct., at 1998 and the medical community's current standards, reflecting improved understanding over time, constrain States' leeway in this area. Here, the habeas court applied current medical standards in reaching its conclusion, but the CCA adhered to the standard it laid out in *Briseno*, including the nonclinical *Briseno* factors. The CCA therefore failed adequately to inform itself of the "medical community's diagnostic framework," *Hall*, 572 U.S., at ——, 134 S.Ct., at 1989. Because *Briseno* pervasively infected the CCA's

analysis, the decision of that court cannot stand. Pp. 1052 - 1053.

470 S.W.3d 481, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C.J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

Bobby James Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death. Moore challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. A state habeas court made detailed factfindings and determined that, under this Court's decisions in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Hall v. Florida*, 572 U.S. —, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), Moore qualified as intellectually disabled. For that reason, the court concluded, Moore's death sentence violated the Eighth Amendment's proscription of "cruel and unusual punishments." The habeas court therefore recommended that Moore be granted relief.

[1] The Texas Court of Criminal Appeals (CCA)¹ declined to adopt the judgment recommended by the state habeas court.² In the CCA's view, the habeas court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides

adopted by the CCA in *Ex parte Briseno*, 135 S.W.3d 1 (2004). See *Ex parte Moore*, 470 S.W.3d 481, 486–487 (2015). The appeals court further determined that the evidentiary factors announced in *Briseno* "weigh[ed] heavily" against upsetting Moore's death sentence. 470 S.W.3d, at 526.

[2] [3] We vacate the CCA's judgment. As we instructed in Hall, adjudications of intellectual disability should be "informed by the views of medical experts." 572 U.S., at -, 134 S.Ct., at 2000; see id., at ——, 134 S.Ct., at 1993. That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors Briseno set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the Briseno factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed," 572 U.S., at —, 134 S.Ct., at 1990. Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled.

I

In April 1980, then-20-year-old Bobby James Moore and two others were engaged in robbing a grocery store. Ex Moore. 470 S.W.3d 481. (Tex.Crim.App.2015); App. 58. During the episode, Moore fatally shot a store clerk, 470 S.W.3d, at 490. Some two months later, Moore was convicted and sentenced to death. See id., at 492. A federal habeas court later vacated that *1045 sentence based on ineffective assistance of trial counsel, see Moore v. Collins, 1995 U.S. Dist. LEXIS 22859, *35 (SD Tex., Sept. 29, 1995), and the Fifth Circuit affirmed, see Moore v. Johnson, 194 F.3d 586, 622 (1999). Moore was resentenced to death in 2001, and the CCA affirmed on direct appeal. See *Moore* v. State, 2004 WL 231323, *1 (Tex.Crim.App., Jan. 14, 2004), cert. denied, 543 U.S. 931, 125 S.Ct. 312, 160 L.Ed.2d 233 (2004).

Moore subsequently sought state habeas relief. In 2014, the state habeas court conducted a two-day hearing on whether Moore was intellectually disabled. See *Ex parte Moore*, No. 314483–C (185th Jud. Dist., Harris Cty., Tex., Feb. 6, 2015), App. to Pet. for Cert. 129a. The court received affidavits and heard testimony from Moore's family members, former counsel, and a number of court-appointed mental-health experts. The evidence revealed that Moore had significant mental and social

difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. *Id.*, at 187a. At school, because of his limited ability to read and write, Moore could not keep up with lessons. *Id.*, at 146a, 182a–183a. Often, he was separated from the rest of the class and told to draw pictures. *Ibid.* Moore's father, teachers, and peers called him "stupid" for his slow reading and speech. *Id.*, at 146a, 183a. After failing every subject in the ninth grade, Moore dropped out of high school. *Id.*, at 188a. Cast out of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning. *Id.*, at 192a–193a.

In evaluating Moore's assertion of intellectual disability, the state habeas court consulted current medical diagnostic standards, relying on the 11th edition of the American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual, see AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports (2010) (hereinafter AAIDD-11), and on the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (APA), see APA, Diagnostic and Statistical Manual of Mental Disorders (2013) (hereinafter DSM-5). App. to Pet. for Cert. 150a-151a, 202a. The court followed the generally accepted, uncontroversial intellectual-disability diagnostic definition, identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score "approximately two standard deviations below the mean"-i.e., a score of roughly 70-adjusted for "the standard error of measurement," AAIDD-11, at 27); (2) adaptive deficits ("the inability to learn basic skills and adjust behavior to changing circumstances," Hall v. Florida, 572 U.S. – -, 134 S.Ct. 1986, 1994, 188 L.Ed.2d 1007 (2014)); and (3) the onset of these deficits while still a minor. See App. to Pet. for Cert. 150a (citing AAIDD-11, at 1). See also Hall, 572 U.S., at —, 134 S.Ct., at 1993–1994.3

Moore's IQ scores, the habeas court determined, established subaverage intellectual functioning. The court credited six of Moore's IQ scores, the average of which (70.66) indicated mild intellectual disability. App. to Pet. for Cert. 167a–170a.⁴ *1046 And relying on testimony from several mental-health experts, the habeas court found significant adaptive deficits. In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical). See AAIDD–11, at 43. Moore's performance fell roughly

two standard deviations below the mean in *all three* skill categories. App. to Pet. for Cert. 200a–201a. Based on this evidence, the state habeas court recommended that the CCA reduce Moore's sentence to life in prison or grant him a new trial on intellectual disability. See *id.*, at 203a.

The CCA rejected the habeas court's recommendations and denied Moore habeas relief. See 470 S.W.3d 481. At the outset of its opinion, the CCA reaffirmed *Ex parte Briseno*, 135 S.W.3d 1 (Tex.Crim.App.2004), as paramount precedent on intellectual disability in Texas capital cases. See 470 S.W.3d, at 486–487. *Briseno* adopted the definition of, and standards for assessing, intellectual disability contained in the 1992 (ninth) edition of the American Association on Mental Retardation (AAMR) manual, predecessor to the current AAIDD–11 manual. See 135 S.W.3d, at 7 (citing AAMR, Mental Retardation: Definition, Classification, and Systems of Supports (9th ed. 1992) (hereinafter AAMR–9)).

Briseno incorporated the AAMR-9's requirement that adaptive deficits be "related" to intellectual-functioning deficits. 135 S.W.3d, at 7 (quoting AAMR-9, at 25). To determine whether a defendant has satisfied the relatedness requirement, the CCA instructed in this case, Texas courts should attend to the "seven evidentiary factors" first set out in Briseno. 470 S.W.3d, at 489.6 No citation to any authority, medical or judicial, accompanied the Briseno court's recitation of the seven factors. See 135 S.W.3d, at 8-9.

The habeas judge erred, the CCA held, by "us[ing] the most current position, as espoused by AAIDD, regarding the diagnosis of intellectual disability rather than the test ... in Briseno." 470 S.W.3d, at 486. This Court's decision in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the CCA emphasized, "left it to the States to develop appropriate ways to enforce the constitutional restriction" on the execution of the intellectually disabled. 470 S.W.3d, at 486. Thus, even though "[i]t may be true that the AAIDD's and APA's positions regarding the diagnosis *1047 of intellectual disability have changed since Atkins and Briseno," the CCA retained Briseno 's instructions, both because of "the subjectivity surrounding the medical diagnosis of intellectual disability" and because the Texas Legislature had not displaced *Briseno* with any other guideposts. 470 S.W.3d, at 486–487. The *Briseno* inquiries, the court said, "remai[n] adequately 'informed by the medical community's diagnostic framework.' " 470 S.W.3d, at 487 (quoting *Hall*, 572 U.S., at ——, 134 S.Ct., at 2000).

Employing Briseno, the CCA first determined that Moore

had failed to prove significantly subaverage intellectual functioning. 470 S.W.3d, at 514-519. Rejecting as unreliable five of the seven IQ tests the habeas court had considered, the CCA limited its appraisal to Moore's scores of 78 in 1973 and 74 in 1989. *Id.*, at 518-519. The court then discounted the lower end of the standard-error range associated with those scores. Id., at 519; see infra, at 1048 - 1050 (describing standard error of measurement). Regarding the score of 74, the court observed that Moore's history of academic failure, and the fact that he took the test while "exhibit[ing] withdrawn and depressive behavior" on death row, might have hindered his performance. 470 S.W.3d, at 519. Based on the two scores, but not on the lower portion of their ranges, the court concluded that Moore's scores ranked "above the intellectually disabled range" (i.e., above 70). *Ibid.*; see *id.*, at 513.

"Even if [Moore] had proven that he suffers from significantly sub-average general intellectual functioning," the court continued, he failed to prove "significant and related limitations in adaptive functioning." *Id.*, at 520. True, the court acknowledged, Moore's and the State's experts agreed that Moore's adaptive-functioning test scores fell more than two standard deviations below the mean. Id., at 521; see supra, at —. But the State's expert ultimately discounted those test results because Moore had "no exposure" to certain tasks the testing included, "such as writing a check and using a microwave oven." 470 S.W.3d, at 521-522. Instead, the expert emphasized Moore's adaptive strengths in school, at trial, and in prison. Id., at 522-524.

The CCA credited the state expert's appraisal. *Id.*, at 524. The habeas court, the CCA concluded, had erred by concentrating on Moore's adaptive weaknesses. *Id.*, at 489. Moore had demonstrated adaptive strengths, the CCA spelled out, by living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison. *Id.*, at 522–523. Those strengths, the court reasoned, undercut the significance of Moore's adaptive limitations. *Id.*, at 524–525.

The habeas court had further erred, the CCA determined, by failing to consider whether any of Moore's adaptive deficits were related to causes other than his intellectual-functioning deficits. *Id.*, at 488, 526. Among alternative causes for Moore's adaptive deficits, the CCA suggested, were an abuse-filled childhood, undiagnosed learning disorders, multiple elementary-school transfers, racially motivated harassment and violence at school, and

a history of academic failure, drug abuse, and absenteeism. *Ibid.* Moore's significant improvement in prison, in the CCA's view, confirmed that his academic and social difficulties were not related to intellectual-functioning deficits. *Ibid.* The court then examined each of the seven *Briseno* evidentiary factors, see *supra*, at 1046 – 1047, and n. 6, concluding that those factors "weigh[ed] heavily" against *1048 finding that Moore had satisfied the relatedness requirement. 470 S.W.3d, at 526–527.

Judge Alcala dissented. Atkins and Hall, she would have held, require courts to consult current medical standards to determine intellectual disability. 470 S.W.3d, at 530. She criticized the majority for relying on manuals superseded in the medical community, id., at 530-534, 536–539, and for disregarding the habeas court's credibility determinations, id., at 535-536, 538-539. Judge Alcala questioned the legitimacy of the seven Briseno factors, recounting wide criticism of the factors and explaining how they deviate from the current medical consensus. See 470 S.W.3d, at 529-530, and n. 5. Most emphatically, she urged, the CCA "must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled"; "reliance on ... standard[s] no longer employed by the medical community," she objected, "is constitutionally unacceptable." Id., at 533.

We granted certiorari to determine whether the CCA's adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment and this Court's precedents. 578 U.S. ——, 136 S.Ct. 2407, 195 L.Ed.2d 779 (2016).

II

[4] [5] The Eighth Amendment prohibits "cruel and unusual punishments," and "reaffirms the duty of the government to respect the dignity of all persons," *Hall*, 572 U.S., at ——, 134 S.Ct., at 1992 (quoting *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)). "To enforce the Constitution's protection of human dignity," we "loo[k] to the evolving standards of decency that mark the progress of a maturing society," recognizing that "[t]he Eighth Amendment is not fastened to the obsolete." *Hall*, 572 U.S., at ——, 134 S.Ct., at 1992 (internal quotation marks omitted).

[6] In Atkins v. Virginia, we held that the Constitution "restrict [s] ... the State's power to take the life of" any intellectually disabled individual. 536 U.S., at 321, 122

S.Ct. 2242. See also *Hall*, 572 U.S., at ——, 134 S.Ct., at 1992–1993; *Roper*, 543 U.S., at 563–564, 125 S.Ct. 1183. Executing intellectually disabled individuals, we concluded in *Atkins*, serves no penological purpose, see 536 U.S., at 318–320, 122 S.Ct. 2242; runs up against a national consensus against the practice, see *id.*, at 313–317, 122 S.Ct. 2242; and creates a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *id.*, at 320, 122 S.Ct. 2242 (internal quotation marks omitted); see *id.*, at 320–321, 122 S.Ct. 2242.

[7] In Hall v. Florida, we held that a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70. 572 U.S., at --, 134 S.Ct., at 2000–2001. Although Atkins and Hall left to the States "the task of developing appropriate ways to enforce" the restriction on executing the intellectually disabled, 572 U.S., at —, 134 S.Ct., at 1998 (quoting Atkins, 536 U.S., at 317, 122 S.Ct. 2242), States' discretion, we cautioned, is not "unfettered," 572 U.S., at —, 134 S.Ct., at 1998. Even if "the views of medical experts" do not "dictate" a court's intellectual-disability determination, id., at —, 134 S.Ct., at 2000, we clarified, the determination must be "informed by the medical community's diagnostic framework," id., at --, 134 S.Ct., at 2000. We relied on the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and AAIDD-11. Id., at -_____. ______, __________, ***1049** 134 S.Ct., at 1991, 1993-1994, 1994-1995, 2000-2001. Florida, we concluded, had violated the Eighth Amendment by "disregard[ing] established medical practice." *Id.*, at ——, 134 S.Ct., at 1995. We further noted that Florida had parted ways with practices and trends in other States. *Id.*. at —— - —, 134 S.Ct., at 1995–1998. Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.

III

of 75 precluded an intellectual-disability finding). As we explained in Hall, the standard error of measurement is "a statistical fact, a reflection of the inherent imprecision of the test itself." 572 U.S., at ——, 134 S.Ct., at 1995. "For purposes of most IQ tests," this imprecision in the testing instrument "means that an individual's score is best understood as a range of scores on either side of the recorded score ... within which one may say an individual's true IQ score lies." Id., at —, 134 S.Ct., at 1995. A test's standard error of measurement "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." Ibid. See also id., at —— – ——, 134 S.Ct., at 1995; DSM-5, at 37; AAIDD, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports 22–23 (11th ed. 2012) (hereinafter AAIDD-11 User's Guide).

Both Texas and the dissent maintain that the CCA properly considered factors unique to Moore in disregarding the lower end of the standard-error range. *Post*, at 1060 – 1061; Brief for Respondent 41–42; see *supra*, at 1046 – 1047; 470 S.W.3d, at 519. But the presence of other sources of imprecision in administering the test to a particular individual, see *post*, at 1060 – 1062, and n. 3, cannot *narrow* the test-specific standard-error range.⁷

*1050 In requiring the CCA to move on to consider Moore's adaptive functioning in light of his IQ evidence, we do not suggest that "the Eighth Amendment turns on the slightest numerical difference in IQ score," post, at 1061. Hall invalidated Florida's strict IQ cutoff because the cutoff took "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." 572 U.S., at ——, 134 S.Ct., at 1995. Here, by contrast, we do not end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score. Rather, in line with Hall, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard

error, falls within the clinically established range for intellectual-functioning deficits.

IV

The CCA's consideration of Moore's adaptive functioning also deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply.

Α

[10] In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. The CCA recited the strengths it perceived, among them, Moore lived on the streets, mowed lawns, and played pool for money. See 470 S.W.3d, at 522-523, 526-527. Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits, see *supra*, at 1045; App. to Pet. for Cert. 180a-202a. See 470 S.W.3d, at 522-524, 526-527. But the medical community focuses the adaptive-functioning inquiry on adaptive deficits. E.g., AAIDD-11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM-5, at 33, 38 (inquiry should focus on "[d]eficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see Brumfield, 576 U.S., at ----, 135 S.Ct., at 2281 ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002))).8

In addition, the CCA stressed Moore's improved behavior in prison. 470 S.W.3d, at 522–524, 526–527. Clinicians, however, caution against reliance on adaptive strengths developed "in a controlled setting," as a prison surely is. DSM–5, at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."); see AAIDD–11 User's Guide 20 (counseling against reliance on "behavior in jail or prison").

1

*1051 B

of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related. See 470 S.W.3d, at 488, 526; *supra*, at 1046, 1047 – 1048. Those traumatic experiences, however, count in the medical community as "*risk factors*" *for* intellectual disability. AAIDD–11, at 59–60 (emphasis added). Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination. See *id.*, at 60 ("[A]t least one or more of the risk factors [described in the manual] will be found in every case of" intellectual disability.).

[12] The CCA also departed from clinical practice by requiring Moore to show that his adaptive deficits were not related to "a personality disorder." 470 S.W.3d, at 488; see id., at 526 (Moore's problems in kindergarten were "more likely cause[d]" by "emotional problems" than by intellectual disability). As mental-health professionals recognize, however, many intellectually disabled people also have other mental or physical impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism. DSM-5, 40 ("[c]o-occurring neurodevelopmental, medical, and physical conditions are frequent in intellectual disability, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population"); see AAIDD-11, at 58-63. Coexisting conditions frequently encountered in intellectually disabled individuals have been described in clinical literature as "[c]omorbidit[ies]." DSM-5, at 40. See also Brief for AAIDD et al. as Amici Curiae 20, and n. 25. The existence of a personality disorder or mental-health issue, in short, is "not evidence that a person does not also have intellectual disability." Brief for American Psychological Association, APA, et al. as Amici Curiae 19.

C

The CCA's attachment to the seven *Briseno* evidentiary factors further impeded its assessment of Moore's adaptive functioning.

[13] By design and in operation, the Briseno factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed," Hall, 572 U.S., at -, 134 S.Ct., at 1990. After observing that persons with "mild" intellectual disability might be treated differently under clinical standards than under Texas' capital system, the CCA defined its objective as identifying the "consensus of Texas citizens" on who "should be exempted from the death penalty." Briseno, 135 S.W.3d, at 6 (emphasis added). Mild levels of intellectual disability, although they may fall outside citizens' consensus, nevertheless Texas remain intellectual disabilities, see Hall, 572 U.S., at --, 134 S.Ct., at 1998–1999; Atkins, 536 U.S., at 308, and n. 3, 122 S.Ct. 2242; AAIDD-11, at 153, and States may not execute anyone in "the entire category of [intellectually disabled] offenders," Roper, 543 U.S., at 563-564, 125 S.Ct. 1183 (emphasis added); see *supra*, at 1048.

Skeptical of what it viewed as "exceedingly subjective" medical and clinical standards, the CCA in Briseno advanced lay perceptions of intellectual disability. 135 S.W.3d, at 8; see *supra*, at 1046 – 1047, and n. 6. *Briseno* asks, for example, "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he *1052 was mentally retarded at that time, and, if so, act in accordance with that determination?" 135 S.W.3d, at 8. Addressing that question here, the CCA referred to Moore's education in "normal classrooms during his school career," his father's reactions to his academic challenges, and his sister's perceptions of Moore's intellectual abilities. 470 S.W.3d, at 526-527. But the medical profession has endeavored to counter lay stereotypes of the intellectually disabled. See AAIDD-11 User's Guide 25-27; Brief for AAIDD et al. as Amici Curiae 9-14, and nn. 11-15. Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.9

2

The *Briseno* factors are an outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in other contexts. See *Hall*, 572 U.S., at ——, 134 S.Ct., at 1996 (consensus in the States provides "objective indicia of society's standards in the context of the Eighth Amendment" (internal quotation marks omitted)). No state legislature has approved the use

of the *Briseno* factors or anything similar. In the 12 years since Texas adopted the factors, only one other state high court and one state intermediate appellate court have authorized their use. See, *e.g.*, *Commonwealth v. Bracey*, 632 Pa. 75, 100–103, 117 A.3d 270, 286–287 (2015); *Howell v. State*, 2011 WL 2420378, *18 (Tenn.Crim.App., June 14, 2011).

Indeed, Texas itself does not follow *Briseno* in contexts other than the death penalty. See Brief for Constitution Project as *Amicus Curiae* 14–17. For example, the relatedness requirement Texas defends here, see *supra*, at 1046 – 1047, is conspicuously absent from the standards the State uses to assess students for intellectual disabilities. See 19 Tex. Admin. Code § 89.1040(c)(5) (2015). And even within Texas' criminal-justice system, the State requires the intellectual-disability diagnoses of juveniles to be based on "the latest edition of the DSM." 37 Tex. Admin. Code § 380.8751(e)(3) (2016). Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake.¹⁰

V

As noted *supra*, at 1048, States have some flexibility, but not "unfettered discretion," *1053 in enforcing *Atkins* 'holding. *Hall*, 572 U.S., at ——, 134 S.Ct., at 1998. "If the States were to have complete autonomy to define intellectual disability as they wished," we have observed, "*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.*, at ————, 134 S.Ct., at 1999.

The medical community's current standards supply one constraint on States' leeway in this area. Reflecting improved understanding over time, see DSM–5, at 7; AAIDD–11, at xiv-xv, current manuals offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians," DSM–5, at xli. See also *Hall*, 572 U.S., at ——, ——, ———, 134 S.Ct., at 1990, 1991, 1993–1994, 1994–1996 (employing current clinical standards); *Atkins*, 536 U.S., at 308, n. 3, 317, n. 22, 122 S.Ct. 2242 (relying on then-current standards).

In Moore's case, the habeas court applied current medical standards in concluding that Moore is intellectually disabled and therefore ineligible for the death penalty. See, *e.g.*, App. to Pet. for Cert. 150a–151a, 200a–203a. The CCA, however, faulted the habeas court for

* * *

For the reasons stated, the judgment of the Texas Court of Criminal Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice THOMAS and Justice ALITO join, dissenting.

The Texas Court of Criminal Appeals (CCA) concluded that Bobby James Moore was not intellectually disabled so as to be exempt from the death penalty under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). It reached that conclusion based on its findings that he had failed to establish either significantly subaverage intellectual functioning or related significant deficits in adaptive behavior. The latter conclusion was based, in part, on the CCA's analysis of a set of seven "evidentiary factors" from Ex parte Briseno, 135 S.W.3d 1, 8 (Tex.Crim.App.2004). I agree with the Court today that those factors are an unacceptable method of enforcing the guarantee of Atkins, and that the CCA therefore erred in using them to analyze adaptive deficits. But I do not agree that the CCA erred as to Moore's intellectual functioning. Because the CCA's determination on that ground is an independent basis for its judgment, I would affirm the decision below.

My broader concern with today's opinion, however, is that it abandons the usual mode of analysis this Court has employed in Eighth Amendment cases. The Court overturns the CCA's conclusion that Moore failed to present sufficient evidence of both inadequate intellectual functioning *1054 and significant deficits in adaptive

behavior without even considering "objective indicia of society's standards" reflected in the practices among the States. *Hall v. Florida*, 572 U.S. —, —, 134 S.Ct. 1986, 1996, 188 L.Ed.2d 1007 (2014) (quoting *Roper v. Simmons*, 543 U.S. 551, 563, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)). The Court instead crafts a constitutional holding based solely on what it deems to be medical consensus about intellectual disability. But clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment. Today's opinion confuses those roles, and I respectfully dissent.

I

On April 25, 1980, Moore and two others were throwing dice when they decided to commit a robbery to obtain money for car payments. Moore provided the group with two firearms, and the three men began to drive around Houston looking for a target. Eventually they settled on the Birdsall Super Market. After negotiating their respective shares of the money they intended to steal and donning disguises, the three went inside, heading straight to a courtesy booth staffed by James McCarble and Edna Scott. When Scott realized a robbery was occurring and screamed, Moore shot McCarble in the head, killing the 70–year–old instantly.

Moore fled Houston and remained on the run until his arrest in Louisiana ten days after the murder. After giving a written statement admitting his participation in the robbery and killing, Moore was charged with capital murder. A jury convicted him and sentenced him to death.

Over the next three decades, Moore's case traversed the state and federal court systems, finally reaching the *Atkins* hearing at issue today in 2014. The state habeas court conducted a two-day evidentiary hearing, during which it heard testimony from family members, a fellow inmate, a prison official, and four mental health professionals. The court concluded that Moore had shown intellectual disability and recommended that he be granted relief.

But it was just that: a recommendation. Under Texas law, the CCA, not the habeas court, is the ultimate factfinder in habeas corpus proceedings. *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex.Crim.App.2008); see also *Ex parte Moore*, 470 S.W.3d 481, 489 (Tex.Crim.App.2015). Assuming that role, the CCA declined to adopt the habeas court's findings and conclusions, instead conducting its own review of the record to determine whether Moore had shown he was intellectually disabled.

The CCA began by considering the appropriate legal standard for assessing intellectual disability. Following our instruction to the States to "develop [] appropriate ways to enforce" Atkins, 536 U.S., at 317, 122 S.Ct. 2242 (internal quotation marks omitted), the CCA had set out a legal definition for intellectual disability in its prior decision in Ex parte Briseno. Rather than follow that test, the habeas court below crafted its own standards for intellectual disability. But "[t]he decision to modify the legal standard for intellectual disability in the capital-sentencing context," the CCA explained, "rests with this Court unless and until the Legislature acts." 470 S.W.3d, at 487. Just as we have corrected lower courts for taking it upon themselves to dismiss our precedent as outdated, see, e.g., Bosse v. Oklahoma, 580 U.S. --, 137 S.Ct. 1, 2, 196 L.Ed.2d 1 (2016) (per curiam), so too the CCA rebuked the habeas court for ignoring binding CCA precedent.

*1055 The CCA went on to explain why there was no reason to modify the legal standard it had previously set out. *Briseno* had stated a rule that in order for an *Atkins* claimant to demonstrate intellectual disability he must show (1) significantly subaverage general intellectual functioning and (2) related limitations in adaptive functioning, (3) which had appeared prior to age 18. See 470 S.W.3d, at 486. It also laid out a set of seven evidentiary factors—the "*Briseno* factors"—designed to assist "factfinders ... in weighing evidence" of intellectual disability. *Briseno*, 135 S.W.3d, at 8.

The three-prong definition of intellectual disability came directly from the ninth edition of the manual published by what is now the American Association on Intellectual and Developmental Disabilities (AAIDD). Id., at 7; see American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992). By the time Moore's case reached the CCA, the AAIDD no longer included the requirement that adaptive deficits be "related" to intellectual functioning. But, as the CCA noted, the most recent version of the other leading diagnostic manual, the DSM-5, did include that requirement. 470 S.W.3d, at 487, n. 5; American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 38 (5th ed. 2013) (hereinafter DSM-5). So the CCA was faced with a choice in *Moore*: Keeping the relatedness requirement would be inconsistent with the AAIDD's current guidance; dropping it would be out of step with the newest version of the DSM. The CCA concluded that "the legal test we established in Briseno remains adequately 'informed by the medical community's diagnostic framework," and went on to evaluate the case under that

approach. 470 S.W.3d, at 487 (quoting *Hall*, 572 U.S., at ______, 134 S.Ct., at 2000).

Starting with intellectual functioning, the CCA conducted a painstaking analysis of the battery of tests Moore had taken over the past 40 years. The CCA concluded that five of the tests the habeas court had considered were unreliable: two of them were neuropsychological tests than formal IQ measures; group-administered tests, which Moore's own experts had criticized, App. 12 (Otis-Lennon Mental Abilities Test "not accepted as an instrument appropriate for the assessment of mental retardation or intellectual deficiency"); id., at 115-116 (Slosson is "not the greatest test" and "not the most reliable approach"); and the administrator of the fifth test concluded it was "not ... a valid score" because of evidence of suboptimal effort, id., at 203.

That left two scores for the CCA to analyze: a 78 and a 74. Significantly subaverage intellectual functioning is "generally shown by an [IQ] of 70 or less." 470 S.W.3d, at 486. "Taking into account the standard error of measurement" for the 78 score yielded a range of 73 to 83—i.e., a range that did not include an IQ of 70 or less. Id., at 519. As for the 74, the CCA again considered the standard error of measurement, which yielded a score range of 69 to 79. The lower end of that range placed Moore within the parameters for significantly subaverage intellectual functioning. The CCA found, however, that Moore's score was unlikely to be in the lower end of the error-generated range because he was likely exerting poor effort and experiencing depression at the time the test was administered—both factors that Moore's experts agreed could artificially deflate IQ scores. Id., at 516-517, 519; App. 46, 92. The CCA accordingly concluded that Moore had failed to present sufficient evidence of significantly subaverage intellectual functioning.

*1056 Having failed one part of the CCA's three-part test, Moore could not be found intellectually disabled. The CCA nonetheless went on to consider the second prong of the test, Moore's adaptive deficits. Moore had taken a standardized test of adaptive functioning in which he scored more than two standard deviations below the mean. But Dr. Kristi Compton, the state expert who had administered that test, explained that it was not an accurate measure of Moore's abilities. She reached this conclusion not because of Moore's adaptive strengths but instead because "she had to assign zeroes to questions asking about areas to which [Moore] had no exposure, such as writing a check and using a microwave oven." 470 S.W.3d, at 522. Dr. Compton further opined that her evaluation of Moore and review of documentary

evidence—including school, trial, and prison records—did not show adaptive deficits sufficient for an intellectual disability diagnosis. App. 185; see 470 S.W.3d, at 521–524.

The CCA also considered and recounted the testimony of the other experts who, unlike Dr. Compton, concluded that Moore had shown significant adaptive deficits. As factfinders often do in confronting conflicting evidence, the CCA made a credibility determination. The opinion of Dr. Compton, the CCA concluded, was "far more credible and reliable" than those of Moore's experts, given Dr. Compton's "considerable experience," "thorough[] and rigorous [] review[] [of] a great deal of material," and personal evaluation of Moore. *Id.*, at 524. Based on Dr. Compton's expert opinion, the CCA concluded Moore had failed to demonstrate significant adaptive deficits.

Finally, the CCA considered whether, even assuming that Moore had made sufficient showings as to intellectual functioning and adaptive deficits, those two were related. Again finding Dr. Compton's testimony the most credible, the CCA concluded that "the record overwhelmingly supports the conclusion" that Moore's observed academic and social difficulties stemmed, not from low intellectual abilities, but instead from outside factors like the trauma and abuse he suffered as a child and his drug use at a young age. *Id.*, at 526. The CCA explained that, in addition to Dr. Compton's expert testimony, consideration of the seven *Briseno* factors reinforced that relatedness conclusion.

Given that Moore had failed to present sufficient evidence on intellectual functioning or related adaptive deficits, the CCA "conclude[d] that for Eighth Amendment purposes," Moore had not shown he was intellectually disabled. 470 S.W.3d, at 527. Accordingly, he was not exempt from execution under *Atkins*.

II

Α

This Court's precedents have emphasized the importance of state legislative judgments in giving content to the Eighth Amendment ban on cruel and unusual punishment. "Eighth Amendment judgments should not be ... merely the subjective views of individual Justices." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion). For that reason, we have

emphasized that "judgment should be informed by objective factors to the maximum possible extent." Ibid. The "clearest and most reliable objective evidence of contemporary values" comes from state legislative judgments. Atkins, 536 U.S., at 312, 122 S.Ct. 2242 (internal quotation marks omitted). Such legislative judgments are critical because in "a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *1057 Gregg v. Georgia, 428 U.S. 153, 175, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (internal quotation marks omitted). And we have focused on state enactments in this realm because of the "deference we owe to the decisions of the state legislatures under our federal system ... where the specification of punishments is concerned." Id., at 176, 96 S.Ct. 2909. For these reasons, we have described state legislative judgments as providing "essential instruction" in conducting the Eighth Amendment inquiry. Roper, 543 U.S., at 564, 125 S.Ct. 1183.

Our decisions addressing capital punishment for the intellectually disabled recognize the central significance of state consensus. In holding that the Eighth Amendment prohibits the execution of intellectually disabled individuals in Atkins, the Court first identified a national consensus against the practice and then, applying our own "independent evaluation of the issue," concluded that there was "no reason to disagree" with that consensus. 536 U.S., at 321, 122 S.Ct. 2242. The scope of our holding—guided as it was by the national consensus—swept only as far as that consensus. We recognized that there remained the potential for "serious disagreement ... in determining which offenders are in fact retarded." Id., at 317, 122 S.Ct. 2242. And we did not seek to provide "definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within Atkins ' compass." Bobby v. Bies, 556 U.S. 825, 831, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009) (alterations and internal quotation marks omitted). Instead, we left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." Atkins, 536 U.S., at 317, 122 S.Ct. 2242 (quoting Ford v. Wainwright, 477 U.S. 399, 416–417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); alterations omitted).

Twelve years after *Atkins*, the Court confronted one State's attempt to enforce the holding of that case. *Hall v. Florida* considered Florida's rule requiring a prisoner to present an IQ score of 70 or below to make out an *Atkins* claim. Although the Court thought it "proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores," it emphasized that

"[t]he legal determination of intellectual disability is distinct from a medical diagnosis." 572 U.S., at -—, 134 S.Ct., at 1993, 2000. It was "the Court's duty"-not that of medical experts-"to interpret the Constitution." Id., at —, 134 S.Ct., at 2000. The Court's conclusion that Florida's rule was "in direct opposition to the views of those who design, administer, and interpret the IQ test" was not enough to decide the case. Id., at —, 134 S.Ct., at 2001. Instead, consistent with our settled approach, the Court canvassed "the legislative policies of various States," as well as "the holdings of state courts," because it was state policies that provided "essential instruction" for determining the scope of the constitutional guarantee. *Id.*, at ——, ——, 134 S.Ct., at 1993, 1999 (quoting *Roper*, 543 U.S., at 564, 125 S.Ct. 1183). State policy, the Court concluded, indicated a "consensus that our society does not regard [Florida's rule] as proper or humane," and that "consensus ... instruct[ed us] how to decide the specific issue presented." 572 U.S., at —, —, 134 S.Ct., at 1993, 1998. The Court was sharply divided on that conclusion, see id., at —— – ——, 134 S.Ct., at 1991–1993 (ALITO, J., dissenting), but not on the fact that our precedent mandated such an inquiry.

В

Today's decision departs from this Court's precedents, followed in *Atkins* and *1058 *Hall*, establishing that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not a medical assessment of clinical practice. The Court rejects the CCA's conclusion that Moore failed to make the requisite showings with respect to intellectual functioning and adaptive deficits, without any consideration of the state practices that were, three Terms ago, "essential" to the Eighth Amendment question. *Hall*, 572 U.S., at ——, 134 S.Ct., at 1999. The Court instead finds error in the CCA's analysis based solely on what the Court views to be departure from typical clinical practice.

The clinical guides on which the Court relies today are "designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning." DSM-5, at 25. They do not seek to dictate or describe who is morally culpable—indeed, the DSM-5 cautions its readers about "the imperfect fit between the questions of ultimate concern to the law and the information contained" within its pages. *Ibid*.

The Eighth Amendment, under our precedent, is supposed to impose a moral backstop on punishment, prohibiting

sentences that our society deems repugnant. The Court, however, interprets that constitutional guarantee as turning on clinical guidelines that do not purport to reflect standards of decency. The Court's refusal even to address what we previously "pinpointed" as "the clearest and most reliable objective evidence" of such standards—the practices among the States—goes unexplained by the majority. *Atkins*, 536 U.S., at 312, 122 S.Ct. 2242 (internal quotation marks omitted).

A second problem with the Court's approach is the lack of guidance it offers to States seeking to enforce the holding of *Atkins*. Recognizing that we have, in the very recent past, held that "the views of medical experts' do not 'dictate' a court's intellectual-disability determination," the Court assures us that it is not requiring adherence "to everything stated in the latest medical guide," *ante*, at 1049 (quoting *Hall*, 572 U.S., at —, 134 S.Ct., at 2000); States have "some flexibility" but cannot "disregard" medical standards. *Ante*, at 1049, 1053. Neither the Court's articulation of this standard nor its application sheds any light on what it means.

Start with the Court's stated principle. "Disregard" normally means to dismiss as unworthy of attention, and that is plainly not what the CCA did here. For example, the Court faults the CCA for placing too much weight on Moore's adaptive strengths and functioning in prison, implying that this marked a dismissal of clinical standards. Yet the CCA was aware of and, in a prior decision, had addressed the fact that some clinicians would counsel against considering such information. See 470 S.W.3d, at 489 (citing Ex parte Cathey, 451 S.W.3d 1, 26–27 (2014)). Both because "[m]ost courts ... consider all of the person's functional abilities" and because it seemed "foolhardy" to ignore strengths, the CCA thought it proper to take note of them. Id., at 27. As to prison conduct, the CCA decided that the fundamental questions the Atkins inquiry sought to answer were best considered—and "sound scientific principles" served—by taking account of "all possible data that sheds light on a person's adaptive functioning, including his conduct in a prison society." 451 S.W.3d, at 26-27. The CCA considered clinical standards and explained why it decided that departure from those standards was warranted. The court did not "disregard" medical standards.

Nor do the Court's identified errors clarify the scope of the "flexibility" we are told States retain in this area. The Court *1059 faults the CCA for "overemphasiz[ing]" strengths and "stress[ing]" Moore's conduct in prison, ante, at 1050, suggesting that some—but not too much—consideration of strengths and prison functioning

is acceptable. The Court's only guidance on when "some" becomes "too much"? Citations to clinical guides. See ibid. But if courts do have "flexibility" in enforcing the guarantee of Atkins and need not "adhere[]" to these guides in every instance or particular, ante, at 1049, 1053, then clinical texts, standing alone, cannot answer the question of why the CCA placed too much weight on adaptive strengths and prison conduct. The line between permissible—consideration, maybe emphasis—and the forbidden—"overemphasis"—is not only thin, but totally undefined by today's decision. It is not at all clear when a State's deviation from medical consensus becomes so great as to "diminish the force" of that consensus, ante, at 1044, and thereby violate the Constitution.

Finally, the Court's decision constitutionalizes rules for which there is not even clinical consensus—a consequence that will often arise from the approach charted by the Court today. Consider the Court's conclusion that, contrary to "the medical community['s] focus[] ... on adaptive deficits," "the CCA overemphasized Moore's perceived adaptive strengths." Ante, at 1053. In support of this proposition, the Court cites the AAIDD's direction that "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports 47 (11th ed. 2010) (hereinafter AAIDD-11). Even assuming that all clinicians would agree with this statement, there are a number of ways it might be interpreted: as meaning that strengths in one of the three adaptive skill areas-conceptual, social, and practical-should not cancel out deficits in another; as meaning that strengths should not outweigh deficits within the same skill area; or as meaning that evidence of some ability to perform a skill should not offset evidence of the inability to perform that same skill. And it appears that clinicians do, in fact, disagree about what this direction means. Compare, e.g., Brief for AAIDD et al. as Amici Curiae 17 ("The clinician's focus does diagnostic not-and cannot-involve any form of 'balancing' deficits against the abilities or strengths which the particular individual may also possess" (emphasis added)) with Hagan, Drogin, & Guilmette, Assessing Adaptive Functioning in Death Penalty Cases after Hall and DSM-5, 44 J. Am. Acad. Psychiatry & L. 96, 98 (2016) ("Any assessment of adaptive functioning must give sufficient consideration to assets and deficits alike.... [I]nventorying only assets or deficits ... departs from DSM-5, [the AAIDD-11], and all other established frameworks" (footnotes omitted)).

The same is true about consideration of prison conduct.

The two primary clinical guides do offer caution about considering functioning in prison. But the stringency of their caution differs, with the AAIDD seeming to enact a flat ban on ever looking to functioning in prison and the DSM urging "if possible" to consider "corroborative information reflecting functioning outside" of prison. AAIDD, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports 20 (11th ed. 2012); DSM-5, at 38. The CCA followed the DSM-5's instruction, relying on Dr. Compton's conclusion that "even before [Moore] went to prison" he demonstrated a "level of adaptive functioning ... too great ... to support an intellectual-disability diagnosis." 470 S.W.3d, at 526. In determining that the CCA erred in this regard, *1060 the Court implicitly rejects the DSM-5's approach to the proper consideration of prison conduct and accepts what it takes to be that of the AAIDD. The Court does not attempt to explain its justification for why the Eighth Amendment should favor one side over the other in this clinical debate.

"Psychiatry is not ... an exact science." Ake v. Oklahoma, 470 U.S. 68, 81, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). "[B]ecause there often is no single, accurate psychiatric conclusion," we have emphasized the importance of allowing the "primary factfinder[]" to "resolve differences in opinion ... on the basis of the evidence offered by each party." Ibid. You would not know it from reading the Court's opinion today, but that is precisely what the CCA-the factfinder under Texas law-did in the decision below: Confronted with dueling expert opinions about how to evaluate adaptive functioning and what conclusion to reach, the CCA resolved the dispute before it by accepting the testimony of the expert it deemed most credible. Of course, reliance on an expert opinion does not insulate a decision from further judicial review. But, unlike the Court, I am unwilling to upset the considered judgment of the forensic psychologist that the factfinding court deemed the most credible based on my own interpretation of a few sentences excised from medical texts.

Ш

As for how I would resolve this case, there is one aspect of the CCA's approach to intellectual disability that is incompatible with the Eighth Amendment: the *Briseno* factors. As the Court explains, no state legislature has approved the use of these or any similar factors. Although the CCA reviewed these factors to determine whether Moore's adaptive deficits were "related" to his intellectual functioning, it may be that consideration of

those factors tainted the whole of the CCA's adaptive functioning analysis. I need not decide this question, however, because the CCA reached the issue of Moore's adaptive functioning only after concluding that he had failed to demonstrate intellectual functioning sufficiently low to warrant a finding of intellectual disability, regardless of his adaptive deficits or their relation to his IQ. Moore has not presented sufficient reason to upset that independent holding.

The Court concludes that the CCA's assessment of Moore's IQ scores is "irreconcilable with *Hall.*" *Ante*, at 1049. Not so. *Hall* rejected a Florida rule that required a prisoner to present an IQ score of 70 or below to demonstrate intellectual disability, thereby barring consideration of the standard error of measurement (SEM) of an over–70 score. But the CCA did not apply Florida's rule—or anything like it. The court in fact began by taking account of the SEM, explaining that Moore's tested score of 74 led to an IQ range between 69 and 79. The court went on to consider additional expert testimony about potential factors affecting that score. Based on that evidence, the CCA discounted portions of the SEM-generated range and concluded that Moore's IQ did not lie in the relevant range for intellectual disability.

Hall provided no definitive guidance on this sort of approach: recognizing the inherent imprecision of IQ tests, but considering additional evidence to determine whether an SEM-generated range of scores accurately reflected a prisoner's actual IQ.¹ Indeed, in its catalog of States *1061 that "ha[d] taken a position contrary to that of Florida," the Court in Hall included a State that granted trial courts discretion to draw "reasonable inferences" about IQ scores and, where appropriate, decline to consider the full range of the SEM. 572 U.S., at ——, 134 S.Ct., at 1998 (quoting Pizzuto v. State, 146 Idaho 720, 729, 202 P.3d 642, 651 (2008)).² That is the approach the CCA took here. If that approach was "contrary" to Florida's rule in Hall, I do not understand how Hall can be read to reject that approach today.

The Court's ruling on intellectual functioning turns solely on the fact that Moore's IQ range was 69 to 79 rather than 70 to 80. See *ante*, at 1049 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning"). The CCA certainly did not "disregard" SEM in assessing Moore's IQ, and it explained why other factors led it to conclude that his actual score did not fall near the lower end of the SEM range. Only by insisting on the absolute conformity to medical standards the Court disclaims can it find a violation of the Eighth Amendment based on that one-point difference. *Ibid.* In concluding that the Eighth

Amendment turns on the slightest numerical difference in IQ score, the Court today is just as wrong as the Florida Supreme Court was in *Hall*.

Today's decision is not compelled by Hall; it is an expansion of it. Perhaps there are reasons to expand Hall 's holding—to say that States must read IQ tests as rigidly encompassing the entire SEM range, regardless of any other evidentiary considerations, or to say that the reasons that the CCA gave for discounting the lower end of Moore's IQ range were improper. But before holding that the Constitution demands either result, our precedent requires consulting state judgments on the matter to determine whether a national consensus has developed. Moore has presented no argument as to such a consensus, and the majority does not claim that there is one. Without looking to any such "objective evidence of contemporary values," Atkins, 536 U.S., at 312, 122 S.Ct. 2242 (internal quotation marks omitted), there is a real danger that Eighth Amendment judgments will embody "merely the

*1062 subjective views of individual Justices," *Coker*, 433 U.S., at 592, 97 S.Ct. 2861 (plurality opinion). As Justice Frankfurter cautioned, "[o]ne must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (concurring opinion).

I respectfully dissent.

All Citations

137 S.Ct. 1039, 197 L.Ed.2d 416, 85 USLW 4165, 17 Cal. Daily Op. Serv. 2957, 2017 Daily Journal D.A.R. 2960, 26 Fla. L. Weekly Fed. S 509

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- The CCA is Texas' court of last resort in criminal cases. See Tex. Const. Art. 5, § 5.
- Under Texas law, the CCA, not the court of first instance, is "the ultimate factfinder" in habeas corpus proceedings. *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex.Crim.App.2008); see *Ex parte Moore*, 470 S.W.3d 481, 489 (Tex.Crim.App.2015).
- 3 The third element is not at issue here.
- The habeas court considered a seventh score (of 59 on a WAIS–IV test administered in 2013) elsewhere in its opinion, see App. to Pet. for Cert. 170a–172a, but did not include that score in the calculation of Moore's average IQ score, see *id.*, at 170a.
- This relatedness requirement, the CCA noted, is retained in the DSM-5. See 470 S.W.3d, at 487, n. 5 (citing DSM-5, at 38).
- 6 The seven "Briseno factors" are:
 - "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
 - "Has the person formulated plans and carried them through or is his conduct impulsive?
 - "Does his conduct show leadership or does it show that he is led around by others?
 - "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
 - "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
 - "Can the person hide facts or lie effectively in his own or others' interests?
 - "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Briseno*, 135 S.W.3d, at 8–9.
- The dissent suggests that *Hall* tacitly approved Idaho's approach to capital sentencing, which the dissent characterizes as "grant [ing] trial courts discretion to draw 'reasonable inferences' about IQ scores and, where appropriate, decline to consider the full range of the [standard error of measurement]." *Post*, at 1061 (quoting *Hall*, 572 U.S., at ——, 134 S.Ct., at 1998 (quoting *Pizzuto v. State*, 146 Idaho 720, 729, 202 P.3d 642, 651 (2008))). We referred in *Hall* to Idaho's capital-sentencing scheme, however, only

to note that the State had "passed legislation allowing a defendant to present additional evidence of intellectual disability even when an IQ test score is above 70." 572 U.S., at ——, 134 S.Ct., at 1997.

- The dissent suggests that disagreement exists about the precise role of adaptive strengths in the adaptive-functioning inquiry. See *post*, at 1058 1059. But even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths in which the CCA engaged, see 470 S.W.3d, at 520–526.
- As elsewhere in its opinion, the CCA, in its deployment of the *Briseno* factors, placed undue emphasis on adaptive strengths, see *supra*, at 1050 1051; 470 S.W.3d, at 527, and regarded risk factors for intellectual disability as evidence of the absence of intellectual disability, see *supra*, at 1050 1051; 470 S.W.3d, at 526–527.
- Given the *Briseno* factors' flaws, it is unsurprising that scholars and experts have long criticized the factors. See, *e.g.*, American Bar Assn., Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report 395 (2013) ("The *Briseno* factors create an especially high risk that [an intellectually disabled defendant] will be executed because, in many ways, they contradict established methods for diagnosing [intellectual disability]."); Blume, Johnson, & Seeds, Of *Atkins* and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases (footnote omitted), 18 Cornell J. L. & Pub. Pol'y 689, 710–712 (2009) ("The *Briseno* factors present an array of divergences from the clinical definitions."); Macvaugh & Cunningham, *Atkins v. Virginia*: Implications and Recommendations for Forensic Practice, 37 J. Psychiatry & L. 131, 136 (2009) ("The seven criteria of the *Briseno* opinion operationalize an *Atkins* interpretation that [exempts only] a subcategory of persons with [intellectual disabilities] from execution."). See also 470 S.W.3d, at 529–530, and n. 5 (Alcala, J., dissenting) (summarizing, in this case, scholarly criticism of *Briseno*).
- Hall also reached no holding as to the evaluation of IQ when an Atkins claimant presents multiple scores, noting only that "the analysis of multiple IQ scores jointly is a complicated endeavor." Hall v. Florida, 572 U.S. —, —, 134 S.Ct. 1986, 1995, 188 L.Ed.2d 1007 (2014). The Court's definition of deficient intellectual functioning as shown by "an IQ score" of roughly 70, ante, at 1045 (emphasis added), is dicta and cannot be read to call into question the approach of States that would not treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores.
- The Court correctly notes that *Hall* cited *Pizzuto* as an instance of a State that had enacted "legislation allowing a defendant to present additional evidence of intellectual disability even when an IQ test score is above 70." *Hall*, 572 U.S., at ——, 134 S.Ct., at 1997. The "additional evidence" that *Pizzuto* considered, however, was evidence that would indicate where within the SEM range a prisoner's IQ likely fell, 146 Idaho, at 729, 202 P.3d, at 651—that is, the same sort of evidence that the CCA considered below.
- It is not obvious that clinicians would ignore evidence beyond the SEM in determining the appropriate range that an IQ score represents. See, e.g., Macvaugh & Cunningham, Atkins v. Virginia: Implications and Recommendations for Forensic Practice, 37 J. Psychiatry & L. 131, 147 (2009) ("Error in intellectual assessment is not solely a function [of the SEM]. Other sources of error or assessment imprecision may involve the examinee ... includ[ing] the mental and physical health, mood, effort, and motivation of the examinee during testing...."); AAIDD-11, at 100-101 ("When considering the relative weight or degree of confidence given to any assessment instrument, the clinician needs to consider ... the conditions under which the test(s) was/were given [and] the standard error of measurement").

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